2968

No. 15085

United States
Court of Appeals
for the Ninth Circuit

TWENTIETH CENTURY DELIVERY SERVICE, INC., a Corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-8-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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GORDON K. WRIGHT,
634 South Spring Street,
Los Angeles 14, California.

In the United States District Court for the Southern District of California Central Division

No. 17927-Y

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Corporation; AIR CARGO, INC., a Corporation; TWENTIETH CENTURY DELIVERY SERVICE, INC., a Corporation; DOE I; DOE II; DOE III; and DOE IV,

Defendants.

FIRST AMENDED COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT AND NEGLIGENCE IN CARRIAGE OF GOODS

Comes Now the plaintiff, and for cause of action against defendants, and each of them, alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, with a principal place of business in the city of St. Paul, Minnesota, and authorized to do and doing business in the State of California as an insurance company. [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

II.

That defendant Trans World Airlines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and maintaining an office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

III.

That defendant Air Cargo, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and maintaining an office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

IV.

That defendant Twentieth Century Delivery Service, Inc., is a corporation organized and existing under and by virtue of the laws of one of the states of the United States, other than the State of California, and maintains an office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

V.

That plaintiff does not know the true names or capacities of defendants Doe I, Doe II, Doe III and Doe IV, and prays that when their true names and capacities have been ascertained this complaint and all proceedings therein may be amended accordingly.

VI.

That at all times Doe I was the agent, servant and employee of defendant Trans World Airlines, Inc.,

and at all times mentioned was acting in the course and scope of his employment as such agent, servant and employee with the permission of his co-defendants.

VII.

That at all times Doe II was the agent, servant and employee of defendants Air Cargo, Inc., and Twentieth Century Delivery Service, Inc., and at all times mentioned was acting in the course and scope of his employment as such agent, servant and employee. [3]

VIII.

That at all times mentioned in the complaint Calnevar Company was a corporation organized and existing under and by virtue of the laws of the State of California, and maintaining an office and principal place of business in the County of Los Angeles, State of California.

IX.

That on or about July 10, 1954, Calnevar Company entered into a written contract with defendant Trans World Airlines, Inc., at St. Louis, Missouri, for the carriage from St. Louis, Missouri, to Los Angeles, California, of one prototype automatic coffee vending machine and one carton of parts, and did then and there deliver said freight in good order and condition to Trans World Airlines, Inc., and agree to pay the transportation charges thereon; that said automatic coffee vending machine was of the approximate value of $130,000.00; that defendant Trans World Airlines, Inc., did enter into

said contract of carriage and did transport said automatic coffee vending machine and carton of parts to Los Angeles, California.

X.

That plaintiff is informed and believes, and on such information alleges, that defendant Trans World Airlines, Inc., did hand said air freight to its co-defendants at Los Angeles International Airport, and direct its delivery to the Calnevar Company at 1732-42 West Washington Boulevard, Los Angeles, California.

XI.

That plaintiff is informed and believes, and on such information alleges, that on July 12, 1954, defendants did transport said automatic coffee vending machine by truck to a public street of the City and County of Los Angeles located in front of the Calnevar Company, and defendants were then advised by employees of the Calnevar [4] Company that they would obtain assistance to remove from defendant's truck said automatic coffee maker; that while Calnevar Company's employees were obtaining assistance, defendants dragged said coffee maker off the rear bed of said truck and dropped it approximately 40 inches to the street pavement with great force and violence.

XII.

That by reason of the gross negligence of defendants, and each of them, said automatic coffee vending machine was caused to be physically damaged to

the extent of $7,725.00, and required the expenditure of labor, parts and material before it could be again utilized by the Calnevar Company.

XIII.

That prior to July 10, 1954, plaintiff had issued to the Calnevar Company a property damage policy with limits of $75,000.00, which was at all times mentioned in the complaint in full force and effect; that said policy provided that in addition to paying for damage to property thereby covered, plaintiff would pay to the assured, Calnevar Company, the sum of twenty-five percent (25%) of the amount of physical damage by and for the loss of use of said article so insured; that pursuant to the terms of said policy, plaintiff did pay to the Calnevar Company $9,656.25, and did thereby become subrogated to all of the rights of the said Calnevar Company, and to the extent of said payment did receive written assignment thereof.

XIV.

That plaintiff has heretofore made a demand upon defendants for payment of its subrogated claim and the same has been denied; that by reason of defendants' negligent failure to safely and properly transport and convey the aforesaid automatic coffee vending machine belonging to the Calnevar Company, plaintiff has been damaged in the sum of $9,656.25. [5]

For a Second, Separate and Distinct Cause of Action, Plaintiff Complains of Defendants, and Each of Them, as Follows:

I.

Incorporates by reference Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, and XIII of its First Cause of Action, with the same force and effect as though fully set forth at this point.

II.

That on July 12, 1954, defendants delivered to the Calnevar Company at West Washington Boulevard, Los Angeles, California, said automatic coffee vending machine in a damaged and broken condition; that by reason of defendants' breach of contract and failure to safely and properly transport and convey the aforesaid automatic coffee vending machine, plaintiff has been damaged in the sum of $9,656.25.

Wherefore, plaintiff prays that it recover damages in the amount of $9,656.25, together with costs of suit and interest, and such other and further relief as may be just and proper in the premises.

LILLICK, GEARY & McHOSE,
GORDON K. WRIGHT,

By /s/ GORDON K. WRIGHT,
Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed May 25, 1955. [6]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, TRANS WORLD AIRLINES, INC., A CORPORATION, TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Comes Now defendant, Trans World Airlines, Inc., a corporation, and, appearing for itself alone and not for any other defendant herein, answers plaintiff's First Amended Complaint and denies, admits and alleges:

Answering the First Cause of Action of Said Complaint, This Answering Defendant Denies, Admits and Alleges:

I.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph I, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

II.

This answering defendant admits Paragraph II.

III.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph III, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

IV.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph IV, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

V.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph V, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

VI.

This answering defendant denies, generally and specifically, Paragraph VI, and each and every allegation therein contained.

VII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph VII, and placing its answer on that ground denies, generally and specifically, said paragraph and each and every allegation therein contained.

VIII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph VIII, and placing its answer on that ground denies, generally and specific- [* * *] [9]

IX.

Answering Paragraph IX of plaintiff's First Amended Complaint, this answering defendant admits that on or about July 10, 1954, Calnevar Company entered into a written contract with this answering defendant at St. Louis, Missouri for the carriage from St. Louis, Missouri to Los Angeles, California, of one crated vending machine and one carton of parts which were delivered to this answering defendant at St. Louis, Missouri, and that this answering defendant did enter into said contract of carriage and did transport said crated vending machine and carton of parts to Los Angeles, California; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph IX, and each and every allegation therein contained.

X.

Answering Paragraph X of plaintiff's First Amended Complaint, this answering defendant admits that it did hand said air freight to the defendant, Twentieth Century Delivery Service, Inc., a corporation, for delivery to the Calnevar Company at 1732-42 West Washington Boulevard, Los Angeles, California; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph X, and each and every allegation therein contained.

XI.

Answering Paragraph XI of Plaintiff's First Amended Complaint, this answering defendant ad-

mits that defendant Twentieth Century Delivery Service, Inc., a corporation, did transport said automatic coffee vending machine by truck to a public street of the City and County of Los Angeles, located in front of the Calnevar Company; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph XI, and each and every allegation therein [10] contained.

XII.

This answering defendant denies, generally and specifically, Paragraph XII, and each and every allegation therein contained.

XIII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph XIII, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

XIV

Answering Paragraph XIV of plaintiff's First Amended Complaint, this answering defendant admits that plaintiff made a claim for payment of its alleged subrogated claim and that this answering defendant has denied the same; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph XIV, and each and every allegation therein contained, and further denies that plaintiff has been damaged in the sum of $9,656.25, or any other sum, or at all.

XV.

Further answering plaintiff's First Amended Complaint, and each and every paragraph, sentence, word and figure thereof, this answering defendant denies that it was, or any of its agents or servants or employees were, guilty of any negligence or carelessness or gross negligence, either as alleged in said First Amended Complaint, or otherwise, or at all, and denies that plaintiff's damages, if any, either as alleged, or otherwise, or in any amount alleged, or in any other amount, or the accident mentioned in said First Amended Complaint, were caused by said alleged, or any, negligence or carelessness or gross negligence of this answering defendant, or of any agent or servant or employee [11] of this answering defendant. As to the amount of plaintiff's alleged damages, this answering defendant has no information or belief sufficient to enable it to answer, and placing its answer on that ground denies that plaintiff was damaged in any sum alleged, or in any other sum, or at all.

Answering the Second Cause of Action of Said First Amended Complaint, This Answering Defendant Denies, Admits and Alleges:

I.

Answering Paragraph I, this answering defendant repeats all of the allegations and denials in its Answer to the First Cause of Action and makes the same a part hereof as though herein fully rewritten.

II.

This answering defendant denies, generally and specifically, Paragraph II, and each and every allegation therein contained.

For a Second, Separate, Further and Distinct Answer and Defense Herein, This Answering Defendant Alleges:

I.

That the accident mentioned in plaintiff's First Amended Complaint, and whatever damage, if any, has been sustained by plaintiff by reason thereof, was the result of an inevitable and unavoidable accident, so far as this answering defendant is concerned.

For a Third, Separate, Further and Distinct Answer and Defense Herein, This Answering Defendant Alleges:

I.

That on or about July 10, 1954, defendant Trans World [12] Airlines, Inc., a corporation, issued to the Calnevar Company, a corporation, its Uniform Airbill, being Airbill Number STL-933916 for the carriage of that certain vending machine and carton of parts referred to in plaintiff's First Amended Complaint; that said Uniform Airbill provided in part as follows:

"It is mutually agreed that the goods herein described are accepted in apparent good order (except as noted) for transportation as specified herein, subject to governing classifications and tariffs in effect

as of the date hereof which are filed in accordance with law. Said classifications and tariffs, copies of which are available for inspection by the parties hereto, are hereby incorporated into and made a part of this contract.

Declared Value—Agreed and understood to be not more than the value stated in the governing tariffs for each pound on which charges are assessed, unless a higher value is declared and applicable charges paid thereon."

II.

That there was issued to defendant Trans World Airlines, Inc., a corporation, a Certificate of Public Convenience and Necessity by the Civil Aeronautics Board pursuant to the Civil Aeronautics Act of 1938 (49 U.S.C.A. Sec. 481).

III.

That pursuant to the terms of the Civil Aeronautics Act, the defendant, Trans World Airlines, Inc., a corporation, duly filed, posted and published its tariffs in the form and manner required; that said tariffs are printed and kept open to public inspection and said tariffs are designated Official [13] Air-Freight Rules, Tariff No. 1-A, C.A.B. No. 13.

IV.

That the tariff established by the Civil Aeronautics Authority, and which was in effect at the time of said flight and constituted a part of the contract of carriage between plaintiff's named assured,

Calnevar Company, a corporation, and this answering defendant, provided in part as follows:

"Limit of Liability:

"(a) In consideration of carrier's rate for the transportation of any shipment, which rate, in part, is dependent upon the value of the shipment as determined pursuant to Rule 4.3, the shipper and all other parties having an interest in the shipment agree that the value of the shipment shall be determined in accordance with the provisions of Rule 4.3 and that the total liability of the carrier shall in no event exceed the value of the shipment as so determined.

"(b) By tendering the shipment to carrier for transportation, the shipper, for himself and all other parties having an interest in the shipment, waives all claims for damages beyond the limitations set forth in these rules and regulations and affirms the description of the shipment as recited on the airbill, and the fact that the shipment is not of a nature unsuitable for carriage by air or hazardous thereto."

V.

That Rule 4.3 referred to above provided in part as follows:

"Charges for Declared Value:

"(a) 1. A shipment shall be deemed to have a declared value of $0.50 per pound (but not [14] less than $50.00) unless a higher value is declared on

the Airbill at the time of receipt of the shipment from the shipper.

"2. (Not applicable to AA, BNF, DAL, MAL, PAI.) Except as otherwise provided in this rule, each part of a shipment handled in Assembly or Distribution Service, as defined in Rule 6.5, shall be deemed to have a declared value of $0.50 per pound unless a higher value is declared on the Airbill for such part at the time of receipt of shipment from shipper.

"3. An additional transportation charge of $0.10 shall be required for each $100.00 (or fraction thereof) by which the value declared on the Airbill at the time of receipt of the shipment from the shipper, exceeds $0.50 per pound or $50.00 (whichever is higher).

"4. The weight used to determine the declared value of a shipment shall be the same as that which is used to determine the transportation charge for such shipment.

"5. A shipment consisting of a commodity and/or article named in paragraph (b) of this rule, moving on one Airbill over the lines of two or more carriers, shall be deemed to have for its entire movement the lowest declared value established by any one of such carriers, unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper, in which event the highest additional transportation charge established by

any one of such carriers shall [15] be applicable to the shipment for its entire movement."

VI.

That Rule 3.1 (c) of said Airfreight Rules Tariff No. 1-A, provided in part as follows:

"(c) The Airbill and the tariffs applicable to the shipment shall apply at all times when the shipment is being handled by or for the carrier, including air transportation by the carrier and pickup, delivery and other ground services rendered by the carrier, or any other person performing for the carrier, such pickup, delivery or ground services in connection with the shipment."

VII.

That neither the plaintiff's assured Calnevar Company, nor anyone on its behalf, at the time this answering defendant entered into a written contract with said Calnevar Company, or at any other time, notified or declared to this answering defendant, or anyone on behalf of said defendant, that any cargo was of a value in excess of the value of $0.50 per pound.

VIII.

That said cargo weighed 245 pounds; that neither plaintiff's assured Calnevar Company, nor anyone on its behalf, at any time paid to this answering defendant any tariff or rate as an additional transportation charge of $0.10, or any other sum, required for each additional $100.00, or fraction

thereof, of declared value, or any tariff or rate at all in connection with any excess value of said cargo.

Wherefore, this answering defendant prays that plaintiff take nothing against it by reason of plaintiff's action [16] herein, and that this answering defendant have judgment against plaintiff for its costs herein incurred, and for such other and further relief as may seem just and proper.

CRIDER, TILSON & RUPPE,

By /s/ DONALD E. RUPPE,

Attorneys for Defendant Trans World Airlines, Inc., a Corporation.

Affidavit of mail attached.

[Endorsed]: Filed June 2nd, 1955, [17]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Comes now the defendant Twentieth Century Delivery Service, Inc., a corporation, and answering the first amended complaint on file herein for itself alone, admits, denies and alleges as follows:

Answer to First Cause of Action

I.

As to the allegations of paragraph III, this defendant denies that Air Cargo, Inc., maintains an

office and place of business in the County of Los Angeles, City of Los Angeles, State of California.

II.

As to the allegations of paragraph IV, defendant admits said allegations except that this defendant alleges that said corporation is organized and existing by virtue of the laws of [19] the State of California.

III.

As to the allegations of paragraphs V, VI, VIII and XIII, this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations.

IV.

As to the allegations of paragraphs VII, XII and XIV, this defendant denies each and every allegation, thing and matter contained in said paragraphs; defendant further denies that plaintiff was damaged in the sum alleged, or in any other sum or at all, whether for the reasons alleged, or otherwise.

V.

As to the allegations of paragraph IX, this defendant admits that on or about July 10, 1954, Calnevar Company entered into a written contract with Trans World Airlines, Inc., at St. Louis, Missouri, for the carriage from St. Louis, Missouri, to Los Angeles, California, of one crated vending machine and one carton of parts which were delivered to Trans World Airlines, Inc., at St. Louis, Missouri, and that Trans World Airlines, Inc., did enter into

said contract of carriage and did transport said crated vending machine and carton of parts to Los Angeles, California; and, except as herein expressly admitted, this defendant denies generally and specifically said paragraph IX, and each and every allegation therein contained.

VI.

As to the allegations of paragraph X, this defendant admits that Trans World Airlines, Inc., did hand said air freight to this defendant for delivery to the Calnevar Company at 1732-42 West Washington Boulevard, Los Angeles, California; and, except as herein expressly admitted, this defendant denies generally and specifically said paragraph X, and each and every allegation therein [20] contained.

VII.

As to the allegations of paragraph XI, this defendant admits that this defendant did transport said automatic coffee vending machine by truck to a public street of the City and County of Los Angeles located in front of the Calnevar Company; and, except as herein expressly admitted, this defendant denies generally and specifically said paragraph XI, and each and every allegation therein contained.

VIII.

This defendant denies that plaintiff sustained damages in any sum or amount whatsoever as the direct or proximate result of any alleged act or acts, fault or carelessness or negligence or reckless-

ness on the part of this defendant, or any of its agents, servants or employees, whether as set forth in the complaint, or otherwise, or at all.

Answer to Second Cause of Action

I.

Answering paragraph I, defendant realleges paragraphs I, II, III, IV, V, VI and VIII of its answer to the first cause of action, and incorporates them herein as though specifically set forth at length.

II.

As to the allegations of paragraph II, this defendant denies each and every allegation, thing and matter contained in said paragraph; defendant further denies that plaintiff was damaged in the sum alleged, or in any other sum, or at all, whether for the reason alleged, or otherwise.

For a Second, Separate and Distinct Answer and Defense Herein Defendant Alleges:

I.

That the accident mentioned in plaintiff's First Amended Complaint, and whatever damage, if any, has been sustained by plaintiff [21] by reason thereof, was the result of an inevitable and unavoidable accident so far as this defendant is concerned.

For a Third, Separate and Distinct Answer and Defense Herein Defendant Alleges:

I.

That on or about July 10, 1954, defendant Trans World Airlines, Inc., a corporation, issued to the Calnevar Company, a corporation, its Uniform Airbill, being Airbill Number STL-933916 for the carriage of that certain vending machine and carton of parts referred to in plaintiff's First Amended Complaint; that said Uniform Airbill provided in part as follows:

"It is mutually agreed that the goods herein described are accepted in apparent good order (except as noted) for transportation as specified herein, subject to governing classifications and tariffs in effect as of the date hereof which are filed in accordance with law. Said classifications and tariffs, copies of which are available for inspection by the parties hereto, are hereby incorporated into and made a part of this contract.

"Declared Value—Agreed and understood to be not more than the value stated in the governing tariffs for each pound on which charges are assessed, unless a higher value is declared and applicable charges paid thereon."

II.

That there was issued to defendant Trans World Airlines, Inc., a corporation, a Certificate of Public Convenience and Necessity by the Civil Aeronau-

tics Board pursuant to the Civil Aeronautics Act of 1938 (49 U.S.C.A. Sec. 481). [22]

III.

That pursuant to the terms of the Civil Aeronautics Act, the defendant, Trans World Airlines, Inc., a corporation, duly filed, posted and published its tariffs in the form and manner required; that said tariffs are printed and kept open to public inspection and said tariffs are designated Official Air-freight Rules, Tariff No. 1-A, C.A.B. No. 13.

IV.

That the tariff established by the Civil Aeronautics Authority, and which was in effect at the time of said flight and constituted a part of the contract of carriage between plaintiff's named assured, Calnevar Company, a corporation, and Trans World Airlines, Inc., provided in part as follows:

"Limit of Liability:

"(a) In consideration of carrier's rate for the transportation of any shipment, which rate, in part, is dependent upon the value of the shipment as determined pursuant to Rule 4.3, the shipper and all other parties having an interest in the shipment agree that the value of the shipment shall be determined in accordance with the provisions of Rule 4.3 and that the total liability of the carrier shall in no event exceed the value of the shipment as so determined.

"(b) By tendering the shipment to carrier for transportation, the shipper, for himself and all

other parties having an interest in the shipment, waives all claims for damages beyond the limitation set forth in these rules and regulations and affirms the description of the shipment as recited on the airbill, and the fact that the shipment is not of a nature unsuitable for carriage by air or hazardous thereto." [23]

V.

That rule 4.3 referred to above provided in part as follows:

"Charges for Declared Value:

"(a) 1. A shipment shall be deemed to have a declared value of $0.50 per pound (but not less than $50.00) unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper.

"2. (Not applicable to AA, BNF, DAL, MAL, PAI.) Except as otherwise provided in this rule, each part of a shipment handled in Assembly or Distribution Service, as defined in Rule 6.5, shall be deemed to have a declared value of $0.50 per pound unless a higher value is declared on the Airbill for such part at the time of receipt of shipment from shipper.

"3. An additional transportation charge of $0.10 shall be required for each $100.00 (or fraction thereof) by which the value declared on the Airbill at the time of receipt of the shipment from the shipper, exceeds $0.50 per pound or $50.00 (whichever is higher).

"4. The weight used to determine the declared value of a shipment shall be the same as that which is used to determine the transportation charge for such shipment.

"5. A shipment consisting of a commodity and/or article named in paragraph (b) of this Rule, moving on one Airbill over the lines of two or more carriers, shall be deemed to have for its entire movement the lowest declared [24] value established by any one of such carriers, unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper, in which event the highest additional transportation charge established by any one of such carriers shall be applicable to the shipment for its entire movement."

VI.

That Rule 3.1 (c) of said Airfreight Rules Tariff No. 1-A, provided in part as follows:

"(c) The Airbill and the tariffs applicable to the shipment shall apply at all times when the shipment is being handled by or for the carrier, including air transportation by the carrier and pickup, delivery and other ground services rendered by the carrier, or any other person performing for the carrier, such pickup, delivery or ground services in connection with the shipment."

VII.

That at the time and place of the damage alleged in the plaintiff's complaint this defendant was handling the shipment of the coffee vending machine for

the carrier Trans World Airlines, Inc., and was delivering and performing ground services in connection with the shipment of the said vending machine for Trans World Airlines, Inc. That the Airbill and Tariff hereinbefore pleaded did apply to the shipment of the coffee vending machine at the time and place of the alleged damage.

VIII.

That neither the plaintiff's assured Calnevar Company, nor anyone on its behalf, at the time Trans World Airlines, Inc., [25] entered into a written contract with said Calnevar Company, or at any other time, notified or declared to Trans World Airlines, Inc., or anyone on behalf of said Trans World Airlines, Inc., that any cargo was of a value in excess of the value of $0.50 per pound.

IX.

This defendant is informed and believes and upon such information and belief alleges that said cargo weighed 245 pounds; that neither plaintiff's assured Calnevar Company, nor anyone on its behalf, at any time paid to Trans World Airlines, Inc., any tariff or rate as an additional transportation charge of $0.10, or any other sum, required for each additional $100.00, or fraction thereof, of declared value, or any tariff or rate at all in connection with any excess value of said cargo.

Wherefore, this defendant prays that plaintiff take nothing against it by reason of plaintiff's action herein; that this defendant have judgment

against plaintiff for its costs incurred herein, and for such other and further relief as the court deems just and proper.

/s/ GENE E. GROFF,
Attorney for Defendant Twentieth Century Delivery Service, Inc.

Affidavit of mail attached.

[Endorsed]: Filed June 15, 1955. [26]

In the United States District Court for the Southern District of California, Central Division

No. 17927-Y

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Corporation; AIR CARGO, INC., a Corporation; TWENTIETH CENTURY DELIVERY SERVICE, INC., a Corporation; DOE I; DOE II; DOE III and DOE IV,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above matter came on regularly for trial on January 10, 1956, before the Honorable Leon R.

Yankwich, Judge of the United States District Court, plaintiff St. Paul Fire and Marine Insurance Company appearing by its attorneys, Messrs. Lillick, Geary & McHose by Gordon K. Wright, Esq.; defendant Trans World Airlines, Inc., a corporation, appearing by its attorneys, Messrs. Crider, Tilson & Ruppe by Donald E. Ruppe, Esq., and Robert D. Brill, Esq.; and defendant Twentieth Century Delivery Service, Inc., a corporation, by its attorney Gene E. Groff, Esq., and testimony both oral and documentary [32] having been received by the court on January 10 and 11, 1956, and the court having considered the evidence and the law and the arguments of counsel and the plaintiff having voluntarily dismissed as to defendant Trans World Airlines, Inc., pursuant to Rule 14 of Federal Rules of Civil Procedure, and the court having filed its Minute Order on January 18, 1956, awarding judgment in favor of plaintiff, the court hereby makes the following findings of fact and conclusions of law:

The court finds as true the following facts:

I.

Plaintiff St. Paul Fire and Marine Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota.

II.

Trans World Airlines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

III.

Twentieth Century Delivery Service, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California.

IV.

Calnevar Company was a corporation organized and existing under and by virtue of the laws of the State of California.

V.

Prior to July 10, 1954, and for a period including July 12, 1954, plaintiff St. Paul Fire and Marine Insurance Company had issued to the Calnevar Company a property damage policy with limits of $75,000.00, which policy was at all times mentioned in the amended complaint in full force and effect; that said policy provided for the payment of all physical damage sustained to personal property [33] belonging to the assured, Calnevar Company, and therein covered, and did also provide for the payment of the sum of 25 per cent over and above the actual physical damage which might be sustained by the assured, said latter amount being by and for the loss of use of said insured personal property during its restoration and repair.

VI.

On July 10, 1954, Calnevar Company entered into a contract in writing with defendant Trans World Airlines, Inc., at St. Louis, Missouri, for the air transportation from St. Louis, Missouri, to Los Angeles, California, of one prototype automatic

coffee vending machine and one carton of parts, and did on July 10, 1954, deliver said airfreight in good order and condition to Trans World Airlines, Inc.; that said automatic coffee vending machine was at said time and place of the approximate value of $75,000.00.

VII.

Trans World Airlines, Inc., did issue its airfreight bill No. 933916 on July 10, 1954, providing for transportation of said coffee vending machine and carton of parts; that said airfreight bill provided for charges based on weight-rate and in addition, did separately provide further pick-up and delivery charges; that at said time and place Calnevar Company did agree to pay all of said charges; that Trans World Airlines, Inc., did enter into performance of said contract of carriage and did transport said cargo to Los Angeles, California.

VIII.

On or about July 12, 1954, there was in existence a contract in writing, dated April 1, 1952, between Trans World Airlines, Inc., a corporation, and defendant Twentieth Century Delivery Service, Inc., a corporation, providing for the latter to perform certain services in connection with airfreight transported by Trans World [34] Airlines, Inc., including services of delivery.

IX.

On or about July 12, 1954, Trans World Airlines, Inc., did hand said coffee vending machine in

good order and condition to defendant Twentieth Century Delivery Service, Inc., for delivery to Calnevar at Los Angeles International Airport.

X.

Defendant Twentieth Century Delivery Service, Inc., did on July 12, 1954, transport by motor truck said automatic coffee vending machine to a position in a public street in the City and County of Los Angeles located in front of the premises of the Calnevar Company; that a servant of defendant Twentieth Century Delivery Service, Inc., was advised by an employee of Calnevar Company that the latter would obtain assistance in removing said automatic coffee maker from the bed of defendant's truck; that in disregard of said offer of assistance, the servant of defendant Twentieth Century Delivery Service, Inc., did drag said coffee maker off the rear of said truck and drop it approximately 40 inches causing it to land in an upside-down position on the street pavement with great force and violence.

XI.

That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged.

XII.

That on July 12, 1954, at or about the hour of 3:45 p.m., the physical damage to said automatic

coffee maker was viewed by an inspector employed by Trans World Airlines, Inc.

XIII.

That subsequent to July 12, 1954, said coffee maker was [35] repaired; that the sum of $7,725 was a reasonable and proper amount for physical repairs; that the sum of $1,931.25 was the reasonable value of the loss of use of said coffee maker.

XIV.

That the Calnevar Company submitted its sworn proof of loss, dated August 26, 1954, to plaintiff St. Paul Fire and Marine Insurance Company in the amount of $9,656.25.

XV.

That on August 26, 1954, plaintiff St. Paul Fire and Marine Insurance Company paid to the Calnevar Company, pursuant to the terms of its contract of insurance, the sum of $9,656.25, representing payment for actual physical damage of $7,725, plus 25 per cent thereof for loss of use, or $1,931.25, and did take from the Calnevar Company its subrogation receipt in the amount of $9,656.25.

XVI.

That defendant Trans World Airlines, Inc., on August 12, 1954, did have on file with the Civil Aeronautics Board its airfreight rules, Tariff No. 1-A, which provided that in consideration of the air carrier's rate for the transportation of any shipment, which rate in part was dependent upon the

value of the shipment as determined pursuant to Rule 4.3 of said Tariff No. 1-A, the shipper, Calnevar Company, agreed that the value of the shipment in respect to Trans World Airlines, Inc., should be determined in accordance with the said Rule 4.3; that said Trans World Airlines, Incorporated's, Rule 4.3 provided that any shipment should be deemed to have a declared value of $0.50 per pound (but not less than $50) unless a higher value is declared on the airbill at the time of receipt of shipment from the shipper; that said airbill No. 933916 did not provide for any higher declared value. [36]

XVII.

That on January 7, 1955, Trans World Airlines, Inc., tendered to plaintiff the sum of $122.50 in full settlement of plaintiff's subrogation claim and that said check was refused and returned to Trans World Airlines, Inc., on January 10, 1955.

XVIII.

That defendant Twentieth Century Delivery Service, Inc., did not on July 10-12, 1954, have on file with the Civil Aeronautics Board any airfreight tariff and was not covered or encompassed within or by the said airfreight tariff of Trans World Airlines, Inc.

XIX.

That there is no evidence that the Calnevar Company entered into any agreement with defendant Twentieth Century Delivery Service, Inc., respecting the value of said automatic coffee maker.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

I.

That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc.

II.

That defendant Twentieth Century Delivery Service, Inc., cannot limit its liability for said damage by any provision contained in airfreight tariff of Trans World Airlines, Inc.

III.

That the damage reasonably sustained by Calnevar Company was in the sum of $9,656.25. [37]

IV.

That plaintiff St. Paul Fire and Marine Insurance Company did pay, pursuant to its contract of insurance, to Calnevar Company the sum of $9,656.25 and did become subrogated to the rights of Calnevar Company against defendant Twentieth Century Delivery Service, Inc.

V.

That plaintiff is entitled to judgment against Twentieth Century Delivery Service, Inc., in the sum of $9,656.25.

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged and Decreed that plaintiff have and recover judgment in the sum of $9,656.25 against defendant Twentieth Century Delivery Service, Inc., together with its costs of suit taxed in the sum of $45.00.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to form:

/s/ GENE E. GROFF,
Attorney for Defendant Twentieth Century Delivery Service, Inc.

[Endorsed]: Filed January 26, 1956.
Docketed and entered January 27, 1956. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that Twentieth Century Delivery Service, Inc., a Corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 27, 1956.

/s/ GENE E. GROFF,
Attorney for Appellant Twentieth Century Delivery Service, Inc., a Corporation.

Affidavit of service by Mail attached.

[Endorsed]: Filed February 21, 1956. [39]

In the United States District Court, Southern District of California, Central Division

No. 17927-Y Civil

Honorable Leon R. Yankwich, Judge Presiding.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Corporation, and TWENTIETH CENTURY DELIVERY SERVICE, INC., a Corporation,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, January 10, 1956

Appearances:

For the Plaintiff:

LILLICK, GEARY & McHOSE, By
GORDON K. WRIGHT, ESQ.,
634 South Spring Street,
Los Angeles 14, California.

For the Defendant Trans World Airlines, Inc.:

CRIDER, TILSON & RUPPE, By
DONALD E. RUPPE, ESQ., and
ROBERT D. BRILL, ESQ.,
548 South Spring Street,
Los Angeles 13, California.

For the Defendant Twentieth Century Delivery Service, Inc.:

GENE E. GROFF, ESQ.,
210 West 7th Street, Room 931,
Los Angeles 14, California.

Tuesday, January 10, 1956, 10:00 A.M.

The Clerk: Are there any ex parte matters?

(No response.)

The Clerk: Case 17927-Y, St. Paul Fire & Marine Insurance versus Trans World Airlines, et al., non-jury trial. For the plaintiff, Mr. Gordon K. Wright of Lillick, Geary & McHose. For TWA, Mr. Donald E. Ruppe and Mr. Robert Brill, and for Twentieth Century Delivery Service, Mr. Gene E. Groff.

The Court: All right, gentlemen, if you desire to make an opening statement, I will hear you.

Mr. Wright: Yes, your Honor. Before doing that, I would like, if I might, to offer into evidence the pre-trial stipulation, which has today been executed by the several counsel, and which is presented to the court.

The Court: It is not on file yet?

The Clerk: Yes.

The Court: Pardon? Has it been handed to the clerk?

Mr. Wright: It is on the clerk's desk, if the court please.

The Clerk: Your Honor, here it is right now.

The Court: Just a minute. You used the word "pre-trial," and, of course, "pre-trial" has a technical meaning as well as a general meaning. This is not a pre-trial order [4*] under Rule 16. This is merely a stipulation by counsel.

Mr. Wright: That is correct, your Honor, for the purpose of this case.

The Court: It may be received in evidence as a plaintiff's exhibit. However, I prefer to have the opening statement precede the receipt of any testimony. [5]

* * *

The Court: Then I want to dismiss as to all of the fictitious names, so that the record will show that we are proceeding against two defendants, Trans World Airlines, Inc., and Air Cargo, Inc.

Mr. Wright: That's right, sir. We may also dismiss, your Honor, as to the defendant Air Cargo, Inc., who was served, but who has not appeared.

The Court: All right. Then the case will be dismissed against Air Cargo, Inc., Doe I, II, III, and IV, and the case will proceed only against the Trans World Airlines.

Mr. Wright: And Twentieth Century Delivery Service.

The Court: What is that?

The Clerk: And Twentieth Century Delivery Service.

The Court: Oh, Twentieth Century Delivery Service. All right. [13]

* * *

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Wright: Yes, your Honor. I offer in evidence the stipulation executed this morning between the parties.

The Court: Now, the exhibits will have to be——

Mr. Wright: ——marked, your Honor.

The Court: You haven't attached them, so you will have to take the exhibits and introduce them in conjunction with this. So we will receive the stipulation as Plaintiff's [15] Exhibit 1, and I will take all your exhibits, your air bill, and other things, and we will give them consecutive numbers.

Mr. Wright: Your Honor, plaintiff offers in evidence, then, pursuant to the stipulation, one, the air bill.

The Clerk: First of all, the stipulation as to facts in the case is offered and admitted as Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit 1, and received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

In the United States District Court for the Southern District of California, Central Division

No. 17927-Y

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Corporation; AIR CARGO, INC., a Corporation; TWENTIETH CENTURY DELIVERY SERVICE, INC., a Corporation; DOE I, DOE II, DOE III and DOE IV,

Defendants.

STIPULATION

It Is Hereby Stipulated and Agreed, by and between the parties, through their respective counsel, for the purposes of this suit, that:

The following, or copies thereof, may be admitted into evidence:

1. Trans World Airlines, Inc., airbill No. 933916.
2. Trans World Airlines, Inc., tariff filed with the Civil Aeronautics Board (or portion thereof) as set forth in certified true copy dated April 28, 1955.
3. Contract dated April 1, 1952, between Air Cargo, Inc., and Twentieth Century Delivery Service, Inc.

It is further stipulated as follows:

1. St. Paul Fire and Marine Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota.

2. Trans World Airlines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

3. Twentieth Century Delivery Service, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California.

4. Calnevar Company is a corporation organized and existing under and by virtue of the laws of the State of California.

5. On January 7, 1955, Trans World Airlines, Inc., tendered to St. Paul Fire and Marine Insurance Company the sum of $122.50, in full settlement of its subrogation claim for alleged damage to the shipment carried under airbill 933916, and that said check was refused and returned to Trans World Air lines, Inc., on January 10, 1955.

6. Air Cargo, Inc., entered into an agreement with Trans World Airlines, Inc., whereby Air Cargo, Inc., entered into that contract dated April 1, 1952, between Air Cargo, Inc., and Twentieth Century Delivery Service, Inc.

It is further agreed that, if the same meets with the approval of the Court, the issue of damages may be tried separately.

/s/ GENE E. GROFF,
Attorney for Defendant Twentieth Century Delivery Service, Inc., a Corporation.

CRIDER, TILSON & RUPPE,
DONALD E. RUPPE,

By !s/ ROBERT D. BRILL,
Attorneys for Defendant Trans World Airlines, Inc., a Corporation.

LILLICK, GEARY & McHOSE,
GORDON K. WRIGHT,

By /s/ ROBERT D. BRILL,
Attorneys for Plaintiff.

Admitted in evidence January 10, 1956.

Mr. Wright: The next is the air bill.

The Clerk: The next thing, a uniform air bill covering the shipment in dispute is offered as Plaintiff's Exhibit No. 2.

Is that admitted, your Honor?

The Court: It may be received.

The Clerk: Admitted in evidence as Plaintiff's Exhibit No. 2.

(The document referred to was marked Plaintiff's Exhibit 2, and received in evidence.)

The Clerk: You want these in this order, Mr. Wright?

Mr. Wright: This next (indicating).

The Clerk: A certified copy of the air freight tariff of TWA is identified as Plaintiff's Exhibit No. 3. Is it admitted, your Honor?

The Court: It may be received.

The Clerk: And admitted in evidence as Plaintiff's [16] Exhibit No. 3.

(The document referred to was marked Plaintiff's Exhibit 3, and received in evidence.)

Mr. Wright: This next (indicating).

The Clerk: A service contract with Air Cargo, Inc., is identified as Plaintiff's Exhibit No. 4. Admitted, your Honor?

The Court: It may be received.

The Clerk: And admitted in evidence.

(The document referred to was marked Plaintiff's Exhibit 4, and received in evidence.)

Mr. Wright: Your Honor, there is one additional stipulation which counsel have agreed to, which has not been formalized in writing, and that is that the St. Paul Fire & Marine Insurance Company is subrogated to whatever rights in the premises belong to Calnevar Company.

The Court: It may be received. The stipulation will be received.

Mr. Groff: So stipulated.

The Court: I assume that appears from the pleadings, because you pleaded subrogation, and I didn't assume that that allegation is denied.

Mr. Wright: Yes, there is no issue on that, your Honor.

The Court: All right. Go ahead.

Mr. Wright: Your Honor, we now offer into evidence the [17] original deposition of Harold E. Sloier. The deposition is signed, but not before a

notary public, and the latter formality has been waived by agreement of counsel.

The Court: All right. It may be received.

The Clerk: Deposition of Harold E. Sloier has been identified and admitted in evidence as Plaintiff's Exhibit 5.

(The deposition referred to was marked Plaintiff's Exhibit 5, and received in evidence.) [18]

* * *

Mr. Wright: This is the deposition of Harold E. Sloier, which was taken in Los Angeles on December 15, 1955, pursuant to stipulation of counsel.

The examination was conducted by Mr. Gene Groff, who is at the counsel table, and representing the Twentieth Century Delivery Service:

"HAROLD E. SLOIER

"called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Groff:

"Q. Mr. Sloier, you are now employed by Calnevar Company?

"A. Shore-Calnevar, Incorporated. [20]

"Q. They are successors to Calnevar?

"A. The Calnevar Company recently changed its name to the Shore-Calnevar, Incorporated.

"Q. In July of 1954 you were employed by them? A. Yes.

(Deposition of Harold E. Sloier.)

"Q. What was the nature of your employment with them at that time?

"A. Chief Engineer of the Calnevar Company."

Mr. Wright then says:

Shall we stipulate that all objections as to the form of the question and responsiveness of the witness' answer are saved?

And that was stipulated by Mr. Ruppe and Mr. Groff.

* * *

Mr. Wright: Yes, sir.

The Court: However, counsel may make any objection they desire as these questions are brought before us, and we will rule on them. [21]

Mr. Wright: Yes, sir. Mr. Groff continues:

"Q. Mr. Sloier, are you an inventor, too?

"A. Yes. I have spent 20 years of my life in designing and developing coin-operating machines.

"Q. If I speak to you about a certain prototype automatic coffee vending machine that allegedly was damaged in July of 1954, you know of what I am speaking, do you? A. Oh, definitely.

"Q. Did you have anything to do with the invention of that machine?

"A. I was the designer of the machine.

"Q. Was it manufactured here or elsewhere?

"A. It was constructed at two places, you might say. One of them was at our previous plant at 1732 West Washington Boulevard, and one of them was in an engineering plant we had on a temporary

(Deposition of Harold E. Sloier.)

basis out in the Valley, in the San Fernando Valley, 4712 Van Noord Avenue.

"Q. You stated that you were the designer. Was there someone with Calnevar Company that was the inventor, if I may use that word?

"A. No. The patents on the machine and all rights were vested in myself.

"Q. Do I take it from that that you were the inventor or you acquired them? [22]

"A. Right, I was the inventor.

"Q. This machine that is concerned in this lawsuit, I notice, is a prototype. Do I take it from that it is the first one that was constructed?

"A. Well, a prototype in the terminology of the trade means a first-hand model machine, in other words, one that is not made by tools but made from drawings by hand.

"Q. When was the prototype finished?

"A. Well, I will have to rely upon my memory now. I would say approximately within the month previous to this accident, I think somewhere around in there.

"Q. You would say approximately June of 1954? A. It is possible.

"Q. After it was completed did you put it to test or see if it worked? What was your procedure there?

"A. Well, there are many procedures. We have them tested ourselves at the plant prior to completion. In other words, let me differentiate between

(Deposition of Harold E. Sloier.)

the term 'completion' and what we term an uncompleted machine.

"When an engineering machine or an engineering device is completed, in our terminology it is, after it has been licensed and the finalizing, which could be inclusive of testing, completed. In other words, the testing of the particular machine to make certain that this machine now [23] is a final device. There is probably a difference in what we are discussing. Are we talking now about a machine that is finished that we want to show somebody or are we talking about the point in which development work stopped and testing began?

"Q. Well, let me try and help you. It is alleged that on July 12th the machine was damaged.

"A. Yes.

"Q. So let's talk about a time prior to that.

"A. Yes.

"Q. This was a coffee vending machine?

"A. That is right.

"Q. Was this something new, a completely new type of machine?

"A. There was nothing of this nature, of this particular machine, theretofore on the market, in other words, nothing.

"Q. After the putting together of the machine, if I can put it that way, I would be correct, would I, that you ran coffee through it to see that it performed its functions? A. Oh, definitely.

"Q. Now, was that done approximately a month prior to July 12th?

(Deposition of Harold E. Sloier.)

"A. Well, actually the testing of this particular machine [24] began, oh, almost six months prior to that particular time.

"Q. Would I be correct that the putting together of the machine was completed approximately six months before July 12th?

"A. Yes, you could say so.

"Q. Then during that six months period you ran various tests to see if it would operate?

"A. That is correct.

"Q. Did those tests before July 12th include both factory tests and field tests to see if it would work?

"A. In an only prototype the engineering division or the engineering department of any company that maufactures or develops a machine of this type are reluctant to see it go out in the field in the hands of an unskilled person so we—put it this way—we had so much invested in this particular machine that the testing was under my personal supervision in our own factory.

"Q. I presume that you ran the first test and then you had to make adjustments or do further work on it?

"A. Well, this machine was made in a rather laborious way by hand, and during the time the tests were run, from the time the tests were run until the time the machine was taken on this trip back east, and which it [25] was the return from this trip that this machine had the accident, there were certain minor revisions made in the particular

(Deposition of Harold E. Sloier.)

machine, in other words, to finalize the design. You see, testing and the design run concurrently, hand in hand, I mean, although the testing is in process until you are actually to the point of saying that we are going to buy it off now, you actually aren't completed. But when this machine went to St. Louis on this particular trip it was all completed, I mean, all the testing had been done.

"Q. At the time the machine went to St. Louis was it finalized then? A. Absolutely.

"Q. How did the machine function? Did it come up to what you had anticipated in design and engineering? A. Oh, definitely.

"Q. What was the principle of the machine? I understand it vends coffee, but did it put cream in it and put sugar in it, or what did it do?

"A. Well, the principle of the machine is this: This is what we call a dry mix or a powdered machine, a coin-operated vending machine which vended a hot beverage. It had within the machine itself three canisters, one of them containing coffee, one of them containing powdered cream, and one of them containing superfine granulated [26] sugar. At the preselection of the customer to the machine he could either select coffee, coffee with cream, coffee with cream and sugar, at will, and upon insertion of a coin the machine would mix those ingredients and blend them together with water to his selection and deliver it in a paper cup.

"Q. You don't happen to have one of the machines at this plant where we are now, do you?

(Deposition of Harold E. Sloier.)

"A. No, we don't. There are, of course, as you realize, a lot of coffee machines as such on the market today. This is not the only hot coffee machine ever made.

"Q. No, in developing your original prototype as you did it here, I imagine it is costly because it is hand labored; that would be correct, would it?

"A. Yes.

"Q. Can you tell us what the cost of developing the first one was?

"A. The whole entire machine to Shore-Calnevar?

"Q. Yes.

"A. Well, I don't know how we can figure our overhead here at the plant so I am going to say exclusive of overhead, and so forth, which we have in this plant, if I were today to put my own money out to develop the machine I would have invested possibly between seventy-five and a hundred thousand dollars to bring the machine [27] around to the point in which this machine was at the time it went to St. Louis.

"Q. Now, after the prototype is finished and finalized do you use the physical prototype machine itself in your future production or do you work from dies or drawings you have drawn before?

"A. Well, this particular machine was a first model. The desire of the Shore-Calnevar Company and myself was to sell this activity. That is what this machine went back East for, went back for a showing and for sales. At the time this machine

(Deposition of Harold E. Sloier.)

was damaged we had planned showings in other cities on the particular machine, showings with the view in mind of doing either one of two things: Either sell it in toto with all the investment we had in it plus a reasonable profit to ourselves, or securing enough interest and orders in the particular machine to warrant us going into the production on that particular machine. That is the reason for the showing. The reason for the showing was to take this out and show this merchandise, and that is one reason why it was insured so heavily. We had so much on it, so much rested on this particular machine in regards to either getting orders to build the particular machine or interesting clients who would build it for us, either on an outright sale or a license or some other agreement of that particular [28] caliber.

"Q. Now, did you——

"A. I will tell you one thing more before we go on.

"Q. Yes.

"A. How much we at our end banked on this machine arriving undamaged. I mean, we had so much invested in it that Fred Plotkin, the president of our company here, bent backwards. I wanted to build a shipping crate for this particular machine. He wouldn't hear any of it. This is factual. Fred Plotkin and myself took his car, his convertible, put the top down and mounted this machine in blankets and drove it over like you would have a crate of eggs to Bekins Van & Storage Company

(Deposition of Harold E. Sloier.)

and they built a special crate for this machine to go to St. Louis. He wouldn't take my word for it that I could pad the crate. Bekins, he wanted them with all their experience to build this crate. The crate was made in such a way, all padded on the inside and the outside, so just by removing the screws in the front—it was not an ordinary shipping crate. This was a crate specially made to show this machine where you could take and put the machine back in the crate and take it out all padded like you would ship a piano. It was all screwed together and made out of heavy lumber.

"I want to bring this point forward. We placed so [29] much value on this particular machine that he wouldn't even allow me—and I have been in the coin-operating machine business for all the years of my life—he wouldn't allow me to crate it, it was so valuable. He took it down there himself and the president of the concern drove the car.

"Q. Is that the crate it came back from St. Louis in? A. That is the crate.

"Q. After it got back from St. Louis did you make showings of the machine after it was repaired? A. Pardon?

"Q. After the machine was damaged was the machine repaired after that?

"A. Oh, definitely.

"Q. Were showings made of it after that?

"A. The machine laid, I think, about four months or three months during the time it was being

(Deposition of Harold E. Sloier.)

repaired, and this is the unfair part of any machine of this caliber. We in the trade say a machine of this type has a shelf life. Once you show it to the trade, you see, you have now shown them your hole card. From there on in it is a race between the time you get in production and the time your competitors will pirate items from the machine which are advantageous to them. So during this time it [30] laid in this repair deal we could not show it and he canceled showings in several cities, Mr. Plotkin did. Finally this machine was sold at a loss, an actual loss, to someone else in this particular area.

"Q. It took four months to repair it, did it?

"A. Approximately four months to repair it.

"Q. You were working on it the whole four months? A. Yes.

"Q. At the time it was being repaired during that four months was the engineering and the drawings—I don't know the business; whatever it took—could you have gone into production even though the prototype was damaged?

"A. It is doubtful, for this reason: When a new machine of this caliber goes into production and you have drawings on the machine and drawings are checked, why, it is a great aid, in fact, almost a necessity, that the tooling division or the people who are making the tools and dies on the particular machine or those who are going to fabricate and assemble this particular machine, have something tangible they can look at, something they can look at and say this part goes there and this part goes there,

(Deposition of Harold E. Sloier.)

and so forth. During that particular time you have to get bids and estimates and it is a difficult thing to get accurate bids and estimates off of drawings which are right down to actual cost, unless they can see what [31] this finalized part looks like, the machine looks like. So it is an essential thing in this type of assembly work where you have a very complex, complicated machine, that the machine be available with the drawings for both production and tooling for estimating.

"Q. Well, in such a procedure I presume you are talking about subcontracting out for your parts and they like to look at it with the drawings; is that right? A. That is correct.

"Q. They don't take the actual parts with them to their plant, the subcontractors, do they; they just look at it here, don't they?

"A. That is correct.

"Q. Now, with the damage on the machine there was nothing to prevent them from looking at the machine even though it was damaged along with the drawings, was there?

"A. Well, it is a very difficult thing to say, 'We want the cabinet made like that except we don't want it there and there and there,' which would be the damaged points. In this type of business you have a very difficult thing or a very difficult—I will qualify it—a very difficult problem in going to another company, a large company, say, like Weber Showcase here in the city, and asking them for a bid on a particular machine and give [32] them a

(Deposition of Harold E. Sloier.)

set of drawings and call them in to see the prototype and then say that the prototype does not necessarily reflect what you want them to do. You tell them you don't want the door to fit this loosely or you don't want the well to break down like this is. If you do that, you are leading with your chin. It is absolutely essential that we show them something that is right up to snuff, you might say, that we set a standard for them with.

"Q. The damaged machine was repaired, I understand? A. That is right.

"Q. Do you have any pictures or anything that show the damaged machine in its damaged condition? A. That I do not know."

Mr. Wright: I might interject at that point, may it please the Court, I endeavored to find or get such photographs if they existed. Mr. Plotkin told me they did not. I agreed with counsel to furnish them if they were available.

The Court: All right.

Mr. Wright: Continuing with the deposition:

"Q. What did the damage consist of? Was it a visible type of thing or was it internal? I have never seen the machine.

"A. Well, I will put it this way: I personally assisted in the uncrating of this particular machine at [33] the Shore-Calnevar plant when it was returned from St. Louis after it was delivered to us. Upon removing the front—we had a dust wrapper that Bekins had supplied that fit over the whole machine so dirt and dust wouldn't get on it—when we

(Deposition of Harold E. Sloier.)

removed the dust wrapper and looked at the machine the damage was visible. We didn't even uncrate the machine the rest of the way. We called the airlines. I wouldn't let a man take it out of the machine. I said, 'Leave it right there,' and then called the airlines. They arrived. It was Mr. Dalton, I believe——

"Mr. Ruppe: What was the name?

"The Witness: I am not sure of that name. I think it was Dalton.

"Mr. Wright: Wait a minute and I will give it to you if you want it. Do you want it?

"Mr. Ruppe: Yes.

"Mr. Wright: George J. Dalton, T.W.A. inspector, LAX. Apparently this report I have is dated 7/12/54, at 3:45 p.m.

"Q. (By Mr. Groff): Did Mr. Dalton come down then and inspect it? A. Oh, yes.

"Q. Do you know if he made a report on it?

"A. Oh, definitely.

"Q. Did he give you a copy of the report? [34]

"A. Yes, I believe the management has a copy of the report. I think they turned it over to our attorneys, I believe. Who has the report now, I couldn't say.

"Mr. Wright: I have what appears to be a carbon copy of the thing. Do you want to look at it? Would it help you, Mr. Groff?

"Mr. Groff: Yes, it might shorten our examination.

(Deposition of Harold E. Sloier.)

"Mr. Wright: This is T.W.A. form F-85-, called Air Freight Shipment Inspection Report.

"Mr. Groff: I would like to have this marked for identification at this time.

> "(The document referred to was marked Defendants' Exhibit A for Identification by the Notary Public and is annexed hereto.)"

The Court: Now, wait a minute. Is that already an exhibit?

Mr. Wright: No, Your Honor. That is attached.

The Court: Then we will have to give it a different number. Otherwise there will be confusion.

The Clerk: You had better take it out, Mr. Wright.

The Court: We had better take it out and give it a number. What will it be?

The Clerk: It will be No. 6.

The Court: No. 6, all right. We will take it out later and not interrupt the reading. [35]

The Clerk: Air freight shipment inspection report is marked, for identification, as Plaintiffs' Exhibit No. 6. Received in evidence, Your Honor?

The Court: Yes, it may be received.

> (The document referred to was marked Plaintiff's Exhibit 6, and received in evidence.)

Mr. Ruppe: Mr. Wright, what page and line?

Mr. Wright: We are now on page 15, line 3.

The Court: I am sorry I mixed you up.

Mr. Wright: Mr. Groff continues:

(Deposition of Harold E. Sloier.)

"Q. Mr. Sloier, this has been marked Defendants' Exhibit A for Identification. Is that a copy of the inspection report that Mr. Dalton made that was given to you? A. That is correct.

"Q. I notice it has the outline of the damages on it. Did you go over those damages or possible damages, as they are stated?

"A. Those were visible things which we could ascertain at that particular time with Mr. Dalton.

"Q. You assisted Mr. Dalton in putting these things down? A. Oh, definitely.

"Q. And the extent that you could see at that time of the damage? [36] A. That is right.

"Q. At the time the report was made this was your best determination at that time of the damage to the machine?

"A. We could not go in and examine any concealed damage to this particular machine because neither he nor I had the time at that particular time to dismantle the machine to find out what was actually wrong.

"Q. I notice you state possible damage to motor or shafts and operating parts? A. Yes.

"Q. You did try and project what the possible internal damage was?

"We had to project what we thought it would be, yes. It was visible to the point you could see the whole inner shelf drooping and being the designer of the machine and knowing how it went together, I could anticipate trouble."

The Court: I think the record should show that

(Deposition of Harold E. Sloier.)

in offering this air freight shipment inspection report you are offering both sides, because you are examining the man as to notations made on the reverse of this instrument.

Mr. Wright: Yes. We have no objection, Your Honor, to both sides.

The Court: I mean, merely to show what you were doing. [37] Go ahead.

Mr. Wright: Line 9, Mr. Ruppe:

"Q. And these are the things you anticipated?

"A. Yes.

"Q. This is the only report you were given a copy of? A. That is correct.

"Q. This is the only report that you know of?

"A. To the best of my knowledge, I would say yes, it is the only one.

"Q. Was there physical evidence of damage to the crate when you first saw it? A. Yes.

"Q. What did it consist of?

"A. Well, our examination by Mr. Dalton and myself, the first thing we did after we saw the way the machine set in the crate itself, we pulled the machine out of the crate, examined the machine, as you see right here now. Then what we did was reassemble the crate to see what damage was done to the crate. The easiest way for us to ascertain that was to put the crate front back on again. There were several parts in the upper part of the crate broken through and some of the side structure had screws that were pulled right out of the crate, but across the whole entire part of the crate it was all [38]

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covered with grease and mud. The whole front part of the crate was blackened and scratched from dirt and mud just ground into it. All over the crate was arrows saying 'Up.'

"Q. What do you mean by the front of the crate now?

"A. The part that you take off in order to have access to the machine.

"Q. That is where the screws held it on?

"A. Yes.

"Q. That was the only part that came off?

"A. Yes, and that was marked on the crate 'Front.' That was marked 'Front' on the crate.

"Q. What else did you observe?

"A. The arrows in the crate all around it saying 'This side up, Fragile.' The dirt marks were across the whole front of the crate. Scratches of the crate itself were noted at that particular time.

"Q. You have described on the front that there was the appearance of grease and mud?

"A. Yes, and scratches were dug right into the wood itself like it had been sliding along.

"Q. Let's leave the front of the crate now.

"A. All right.

"Q. Now, the sides and, let me say, the back, what [39] did you observe there? Were there scratches or what did you see?

"A. Merely some of the nails pulled loose in a particular place and the crate setting at a slight angle, which you would expect if a crate was dropped suddenly.

(Deposition of Harold E. Sloier.)

"Q. Structurally the remainder of the crate, other than the front, showed loose nails, or something like that, but it was only the front that showed scratches, mud or grease; would that be correct?

"A. To the best of my knowledge at that particular time.

"One other thing I will qualify is this: If you will recall just previous to speaking about this front I explained about the top of the crate where we had noticed the cracks and the nails pulled loose. That is on the part which would be where the arrows are around the particular crate itself, in other words, arrows that said 'This side up.'

"Q. That would be the up side?

"A. That would be the up side, that is right.

"Q. The crate was——

"A. It was not standing in its correct position.

"Q. ——about how big?

"A. I would estimate the crate to be 24 inches wide, 20 inches deep, and about 65 inches high. It was [40] made of three-quarter inch lumber and not of thin crating material.

"Q. Now, did this machine actually go into production eventually?

"A. This particular machine right now is at the point, I believe, of going into production by the people who purchased the machine.

"Q. Did you get any orders for machines at the St. Louis showing?

"A. Yes. We have a deal on the fire to sell the

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whole entire machine in toto to a company in St. Louis, which subsequently fell through due to the fact that we could not bring the machine back and we could not produce the particular machine for field tests which they wanted to make in the field.

"Q. This deal that you spoke of in St. Louis, I presume, was not actually consummated at the time this thing was damaged?

"A. We came back from St. Louis with a tentative arrangement.

"Q. Some details were to be worked out yet?

"A. Right.

"Q. The deal that you had in St. Louis was for a transfer of the physical machine and all your rights and patent rights and everything else? [41]

"A. Yes, based on tests made on the machine.

"Q. Now, who was that deal with, by the way?

"A. I believe that particular deal was with National somebody in St. Louis. Just who the rest of the company is, I couldn't say.

"Q. Now, in addition to this in St. Louis did you get orders for units themselves in St. Louis?

"A. That would be out of my province. I mean, I am not the one that would handle that. That would be handled by Mr. Plotkin, the president of this concern.

"Q. You do not know whether there were orders or not? A. No.

"Q. In your contemplated production or in the contemplated production from the time it was dam-

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aged, was it on a packaged deal to sell everything or were you going to build the units and sell them?

"A. I believe that was nebulous as far as I am concerned. I mean, it is a question which management alone could make a decision on. I was merely the engineer in this particular enterprise and the inventor of the particular machine, but negotiations in regards to dollars, and so forth, and the manner in which this machine would be fabricated or sold or partially sold, was solely within their province. [42]

"Q. Let me ask you this: As of today if there was a decision reached for your production would individual machines be sold at this time?

"A. No. This machine now is in the process of being tooled for production.

"Q. That is your own production?

"A. No, no, it is not. We sold this particular machine later on.

"Q. All right. You sold the use of the patent rights and everything else, all your rights in it?

"A. Yes.

"Q. Is that correct? A. Yes.

"Q. When was that sale made?

"A. Oh, I would say approximately six months ago.

"Q. At any time have you ascertained or run a cost or an estimate on the cost, production cost, of making the unit? A. Oh, yes.

"Q. How much would it cost to make the unit in production?

"A. Well, you have to qualify that question for

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me. Are you asking now how much each unit would cost and if so, what production quantities are we talking about? Or are you talking about what it will take in dollars to [43] tool this particular machine? Which of those three?

"Q. I am talking about the production of a unit that you are going to, let's say, sell to a wholesaler, or however you distribute it?

"A. I don't get the question, I am sorry.

"Q. All right, let me reask it. I am speaking of the production cost without tooling, that is, the cost to the manufacturer to start and end up with a finished coffee vending machine. How much would that cost be? A. Well——

"Mr. Wright: Excuse me. I think that is still a little confusing. You say without tooling.

"Q. (By Mr. Gross): Is it confusing to you?

"A. Yes.

"Q. All right, let me reask it.

"A. Let me explain something. Don't take this down if you can help it.

"Mr. Wright: Do you want to get off the record a minute?

"Mr. Ruppe: All right.

"Mr. Groff: Yes.

(A discussion was had off the record.)

"Q. (By Mr. Groff): Ignoring the capital investment, in order to set up a production line, to make the question clearer, after that you have labor and materials [44] to go in?

(Deposition of Harold E. Sloier.)

"A. That is right.

"Q. How much would it cost to produce one machine? Is that a fair question?

"A. To produce one machine from production tools?

"Q. Yes, all set to go.

"A. From production tools?

"Q. Yes.

"A. Mind you, now, I will outline a few things for you to qualify my answer to you. To produce one machine from production tools would encompass setting up all your punch presses, all your operations, to produce one machine. During the time they were producing that one machine, to run those punch presses another half hour might produce a hundred parts, so the cost of producing one machine, as a rule of thumb, would be equal to the production cost of 100 machines in a production run.

"Q. How much would that be?

"A. Oh, I would probably say you are talking about maybe $35,000.

"Q. All right. If we ran a hundred machines, how much would it be? Would that still be $35,000?

"A. Oh, no.

"Q. Well, I misled you on the question. If we ran the full 100 machines—withdraw the question. You have [45] answered the question.

"A. You are getting into a problem on a particular machine when you talk about production runs because it is one of those was-you-there-Charlie

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deals, who is doing the tooling, who is doing the punch press work, who is doing the assembly work, and what are we talking about?

"Q. You have an idea as to what the reasonable cost would be, though, don't you?

"A. The original cost based on—you asked about one machine. Now, my interpretation would be that if we had all the tools and were all set to go and we wanted to build one machine for those particular tools it would cost us $35,000 to put that machine on the floor.

"Q. All right. Now, I have all the tools and I want to run 100 machines. How much does it cost to put each machine of the 100 on the floor?

"A. I would say above that you would probably add, if you are running a hundred I would add, in my interpretation, about, oh, $500.00 a machine. You see, let me explain something to you gentlemen. I will give some information which you might not agree with or you might. The idea in back of this particular little machine which we developed was to design a machine that can be made in high production at a tremendously low cost. There is the Achilles heel of this whole deal. This machine was designed in such a [46] manner that on production runs of 10,000 or so, which it was planned for, this machine could be produced at a point and perform all the functions of machines which cost thousands of dollars to perform. This machine would probably sell in large quantity runs of 10,000 somewhere around maybe a half to a third of the price of that

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big machine but it did everything the big machine did. But its value lay only in production. Now, if you cannot afford high production tools to make this particular machine, the way it was made, being a precision machine, then of course, this particular machine in 100 lots might cost a fantastic sum with relation to other machines on the market. It was only based on the type of tooling you would have. It was not designed to be made in lots of one or ten or a hundred or a thousand.

"Q. But if you had the tooling and you ran a hundred, it would cost you approximately $500 to put each unit on the floor?

"A. Above your $35,000.

"Mr. Wright: That would be $85,000, wouldn't it?

"The Witness: These machines, if you produced a hundred, would reasonably cost that much, $850 apiece or more.

"Q. (By Mr. Groff): What was the $35,000, the cost of tooling? [47]

"A. That would be the cost of setting all your dies up and all your plating processes up to plate one part, to fabricate one part, to stamp one part, and so forth all the way down the line.

"Q. Assuming, though, that you've got the thing tooled, when you set up you have to set a machine and get ready to go. Now, that is what the $35,000 would be for; is that correct? A. Yes.

"Q. Now, with that being accomplished, ignoring that cost, you start with labor and materials

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beyond that to put the machine through and it would cost about $500 per machine if you ran it in lots of 100?

"A. That is right, let me give you an example. Suppose I had a company here in Los Angeles bidding on a cabinet for this particular machine and they bid, say, $35 to make a cabinet in lots of 5000. It is reasonable to assume they might charge as much as a hundred to $200 a cabinet to build one cabinet after tooling.

"Q. During the four months period that this thing was being repaired, the prototype, what did you do, if anything, toward getting any production on a production line basis?

"A. Nothing much could be done.

"Q. Did you do anything? [48]

"A. Yes. We ran some costs analysis on the particular machine but the actual work in regards to placing it in production was at a standstill, you might say.

"Q. In running the cost analysis did you contact subcontractors? A. The best we could, yes.

"Q. Did you contact subcontractors so that you had cost analyses figures for the whole machine and all its parts during that four months?

"A. I won't venture a guess as to that. I know management was working on cost figures. You see, there is a line drawn between engineering as such of a company and the production division as such of a company. You naturally hear what is going on

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in the company because it is in the next room to you and you might know something is going on but the actual figures, and so forth, I do not have access to.

"Q. Whatever work was done in getting cost analysis, or whatever it was, that was eventually utilized in your present program of production, wasn't it?

"A. I don't believe so because all the work that was done here in the plant, all the work that was done in regard to planning as to what assemblies would go where and all the work that was done—we had bushel baskets of quotations on this particular machine made [49] which our purchasing department had gone out and gotten quotations on from three or four suppliers for a particular stamping or painting job—that went into the hundreds and hundreds and hundreds of parts. There were three hundred and some parts or more in this particular machine and there were quotations for each of the parts from at least three sources. When this machine finally ended up, when it was sold at a loss and it went down the drain, they would give us absolutely nothing for the work that was done.

"Q. Would it be a true statement that after you had done this work your theory on how it was going to be produced changed then?

"A. No, absolutely not. The only thing is that the people who bought the particular device said, 'Your work that you have here now is valueless

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to us because it is a different system than we use in our plant.'

"Q. Then the bushel baskets of estimates that you got, those were obtained approximately during the four months period while the machine was being repaired? A. Oh, no.

"Q. Over what period were they obtained?

"A. Oh, they might have been obtained over a period of six or more months. [50]

"Q. That would be six months from the date of the damage?

"A. From the time we said, 'Now the machine is at a point where you can start getting quotations which have a basis of fact.'

"Q. Would I be correct that at least some of the subcontractors that furnished quotations came and looked at the machine even though it was in a damaged condition or was being repaired?

"A. Oh, some of those quotations were made prior to its going to St. Louis.

"Q. During the four months some of the subcontractors came and looked at the machine?

"A. I believe not at the machine, but I believe at our drawings. To look at the machine during that particular time would be difficult because the machine was in a state of disassembly, you might say.

"Q. But they were able to go ahead with their estimates just from the drawings themselves?

"A. The best they could, but not complete.

"Q. The machine was repaired in your own shop, you stated, didn't you? A. Yes.

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"Q. What was the cost of repairing the damage to the machine? [51]

"A. I couldn't say in dollars because I wouldn't be involved in that. I am merely going to rely upon my memory now. I would say somewhere around, oh, between eight hundred and a thousand hours, actual man hours."

Mr. Groff: Your Honor, I believe I have to object to that on the basis of the witness' own statement, that it wasn't within his province, and it is not material and it is not proper evidence of damage, or repair cost for the machine, and I move it be stricken.

The Court: That will be denied, because the rule in California is that in proving damage, you can prove it either by showing—take in automobile cases, for instance, in order to show damage to an automobile, you can do it two ways. You can show what the automobile was worth before and after, or you can produce the cost of the repair.

Mr. Groff: I am not objecting to that, Your Honor, but it is the witness' statement. The question was:

"Q. What was the cost of repairing the damage to the machine?"

And this is his statement:

"Oh, I couldn't say in dollars because I wouldn't be involved in that."

And then he went on and made a further statement.

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Mr. Wright: Well, he spoke about man hours. [52]

The Court: That goes to the weight. He merely says that he is giving a general estimate, which goes to the weight. Overruled.

Mr. Wright (Continuing reading):

"Q. Can you convert that into dollars for me?

"A. It is a difficult thing to convert into dollars because to convert it into dollars I would have to know the manner in which our company here applies their overhead to labor figures.

"Q. Were there materials also that, of course, went into it? A. Oh, yes.

"Q. Do you know what the materials involved would cost?

"A. Well, there were materials, small fixtures, and so forth, which were reset up and small tools and dies which were again made to go back over the ground which we had already gone over. Oh, I would say a reasonable figure in there would be, oh, under a thousand dollars on the material and special tools that had to be made again and gone back over again.

"Q. After making the prototype, from what you have just said am I correct that at least some of the tooling was not kept intact?

"A. There was no tooling. These are hand set. When [53] I speak of tooling here I speak of a separate little soldering jig or welding jig or drilling jig made temporarily to make this one part. This is not tooling; these are handmade machines.

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"Q. There is a list of damages that you and Mr. Dalton tried to estimate when you saw the machine. This listing is on the back of Defendants' Exhibit A for Identification. Can you recall of anything other than those things that are on there that you found were damaged after you got into the machine?

"A. I gave a complete list of the itemized parts, in other words, a complete itemized parts list of the damage of this particular machine, to management, but to recall them to mind right now, I don't.

"Q. Would I be correct that somebody with Calnevar, which is now Shore-Calnevar, knows more about this end of it than you do; would that be a true statement?

"A. In operating the company on a dollar basis?

"Q. Yes. A. Oh, definitely.

"Q. Who would that be?

"A. Mr. Fred Plotkin. Mr. Fred Plotkin handles the administrative functions of the Shore-Calnevar Company.

"Q. Were there any changes made in the machine from the damaged prototype to the way the machine was [54] when it was repaired after the damage? A. No.

"Q. It was identical to the way it was before it was damaged?

A. Yes. There were certain things which to the eye, to the trained engineer, were not as good, but I will qualify it by saying this: They were not damaged to a point where I would say they were not

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usable. There were certain items in the machine which were not claimed as damage whatsoever which were usable because it was obvious we could get by with them.

"Q. Functionally, when the machine was repaired it was in as good a shape as before it was damaged? A. That is correct.

"Q. Mr. Sloier, would you tell us what you can about——

"A. I am going to make this fellow say Sloier.

"Q. Pardon me. Mr. Sloier, will you tell us of your own knowledge what you personally know, saw or whatever it was, in connection with the delivery of the machine on the day you discovered the damage?

"A. Well, I returned from St. Louis by plane and this machine was returned on the following plane on T.W.A. Knowing that we had a schedule set up ahead of us for these various showings which we had for companies [55] here in California and other cities, when we arrived in Los Angeles I was given the assignment by Mr. Fred Plotkin, who had also been with me on the trip to St. Louis, to have an A. No. 1 job, and that was to trace this machine down and get it back to Calnevar here. So we began immediately calling and asking for delivery of this particular machine. We called T.W.A. and they told us what flight it was on and when it was arriving, and so forth, and the truck, and so forth, so we were practically waiting for that machine because

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we had a showing that afternoon in our plant of this particular machine to some Los Angeles business associates of Mr. Plotkin. They were to be here at our plant. We were rather concerned when the machine didn't arrive when it should have. It was delayed probably a little en route. When I was returning from—we have three plants in the particular area there and I don't recall whether I was returning from one of the three plants or what, but I was coming into the front entrance of our plant on Washington Boulevard when this truck drove up on the street. The back of the truck was, oh, about even with our driveway as I drove my car up there.

"I drove up and parked right in back of the truck with my own personal car and I could see that this was our machine in the truck which we were after. The delivery man was not there. The driver was inside the building, [56] but the machine was in the truck laying flat in the truck. In other words, the crate was laying down instead of being stood up on end in the truck, like this here.

"I went in to our information girl and the truck driver was standing there. He said he was from T.W.A. and he had a shipment. I told him to wait a minute and I would get a man to help unload it. It is about 30 feet from the information desk back to the main door of our place where our janitor was working. I asked the janitor to go out with me and help him take the crate off the truck because the driver was alone. I asked him to help him off with

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this machine. I told the driver, I says, 'Wait, I will get someone to help you with that machine.'

"By the time we walked back and the man had picked up a two-wheeled truck, our maintenance man or our janitor picked up a two-wheeled truck to go out in the street, by the time we got out our doors, which were opened, already the driver had let this machine off the back of the truck down on the street upside down. The machine weighed better than 200 pounds. He couldn't hold the whole machine so it come down on the street rather suddenly upside down with the arrows pointing down instead of up.

"So I told our maintenance man to wheel it into our [57] plant, but before we wheeled it in I asked the T.W.A. man, whom I believe was a T.W.A. man driving the truck, to assist our maintenance man in turning this crate right side up on the street.

"So we took it back into our plant right side up. It was right side down when he unloaded it himself off the truck. That drop was, I would say, four feet off of the truck. It was a high-back-end truck. When we got it back in there we uncrated it, removed the dust cover, and saw the damage to it.

"Q. Maybe this will help us a little bit. We can scratch the writing off of the back, if you wish. It is just the identification.

"Mr. Wright: That is all right. I take it this is a picture of the entrance?

"Mr. Groff: Yes. Would you mark that for identification, please?

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"The Witness: Could I see the picture of our entrance?

"Mr. Groff: I am told that is what it is.

"The Witness: Yes, this is the picture of our entrance in which we came down with a small hand truck. The truck, by the way, for your information, was parked on the street right out next to—not this car, but next to a car, like this. He was double parked.

"Mr. Wright: He was double parked? [58]

"The Witness: He was double parked.

"Mr. Wright: Why don't you mark it Defendants' Exhibit B for Identification, the photograph we have been talking about?"

At this time, Your Honor——

The Court: Just a minute.

Mr. Wright: Your Honor, here is the photograph referred to in the deposition. May that be Plaintiff's Exhibit 7?

The Clerk: Photograph marked—is it received, Your Honor?

The Court: It is received.

The Clerk: As Plaintiff's Exhibit No. 7.

(The document referred to was marked Plaintiff's Exhibit 7, and received in evidence.)

Mr. Wright (Continuing with the questioning by Mr. Groff):

"Q. This Defendants' Exhibit B for Identification does, other than for the auto that is there and

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some other little article, fairly depict the position of the building and the door on the day of the accident, does it?

"A. Well, in general, yes, that is it.

"Q. Approximately in the middle of the picture there is a wide door. Is that the door you have testified to that you came out of? [59]

"A. That is the door I came out of with the hand truck, that is correct, but that is not the door the truck driver went into. He went into our office.

"Q. Where was the truck driver's truck parked?

"A. He was double parked at a point probably adjacent to where you see that car right now. The back of his truck was about ten feet this side of our opening in the driveway.

"Q. There is a black little sports car, a foreign car, that shows on this Defendants' Exhibit B for Identification? A. Yes.

"Q. The back bumper of that car, where would the rear of the truck be parked with relation to that?

"A. I would say the back of his truck was about at the point where the back of the bumper is.

"Q. Now, were you——

"A. Another thing on here, this here side of this picture over here——

"Mr. Wright: Indicating the right-hand side of of the picture?

"The Witness: The right-hand side of the picture—extended out in this picture is where I pulled my car in and parked here in back of him.

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"Q. (By Mr. Groff): Then when you went into the [60] building when you first came back and saw the truck there, did you go in through these large doors that show on Defendants' Exhibit B?

"A. Right.

"Q. Then you came back out those doors and another employee accompanied you and he had a hand truck? A. Yes.

"Q. When you first saw the truck when it was first visible to you when you were coming back out again, what did you see then? What was the truck driver doing and where was the crate?

"A. He was right in the process of taking the crate off by himself.

"Q. Was the crate over the end of the tailgate by then?

"A. It was at a point where it was just too late for us to holler stop. He was already in the process of bringing it down.

"Q. Now, in letting it down he never took his hands off of it, did he?

"A. Actually, the crate went right down between his fingers. He could never hold that 200 and some pounds alone.

"Q. Did you see him lose a grip on it?

"A. I can't say that he lost a grip on it. All I [61] know is it came down very hard onto the ground. His hands were still on the crate, but whether he had lost his grip or whether he realized that he had taken on something that he shouldn't have, I couldn't say.

(Deposition of Harold E. Sloier.)

"Q. How was the crate laying on the truck? It is about 20 by 24 by 65 inches, as I recall your estimate of it? A. Yes.

"Q. Was it down so that the large part was flat on the truck, or how was it? What was its position?

"A. I could not say whether it was on the front or back but the crate appeared to be either on its front or back.

"Mr. Wright: On the long dimension?

"The Witness: On the long dimension. In other words, the crate had fallen down—not fallen down, but was laying down either this way or this way. It was not laying on its side, it was laying on its front or back.

"Q. (By Mr. Groff): So that would be the 20 or the 24 inch dimension?

"A. The 24 inch dimension and the 65 inch dimension would be laying flat on the truck bed.

Q. Then when it came off the truck and went down to the ground did it go down to the ground in that same position? [62]

"A. No, the crate came off of the truck like this here and it went down to the ground like this so the top of the crate, the part in which the arrows show up, was down. In other words, the normal crate was rotated 180 degrees upside down.

"Q. Where was the man with the pushcart when you first saw the thing drop down?

"A. Approximately right with me, just coming out of the doorway.

(Deposition of Harold E. Sloier.)

"Q. Was there anyone else there that you know of?

"A. Not to my knowledge. There might have been, but not to my knowledge. I mean, I couldn't say. We are a big plant and probably many people might have been around but I don't recall, anyway, to see.

"Q. You stated that you were the inventor of the machine and the patent rights were in your name? A. Yes.

"Q. Was there any arrangement between you and Calnevar in connection with the machine? Now, if I have confused you in the question——

"A. Yes, I think you have.

"Q. ——I will restate it. All right. Let me say this: Forgetting for a moment any arrangements you possibly had with Calnevar, it would be a fair statement that you were the owner of the patent rights and the machine [63] and you invented it?

"A. Yes.

"Q. Now, did anyone else have any interest in it besides you?

"A. Interest in the invention of the particular machine?

"Q. No, an interest in the machine itself, in the box that came down.

"A. Let me qualify something. The tangible items, the machine itself, you could say, is the property of the Calnevar Company.

"Q. That's what I want you to explain to me.

(Deposition of Harold E. Sloier.)

"A. The intangible things, the patents and rights of ownership of those patents, were mine.

"Q. All right.

"A. They had exclusive license on this particular machine. They were the exclusive licensee of this particular machine.

"Mr. Wright: That is, Calnevar was the 'they' you are referring to?

"The Witness: Calnevar. They had all the sales rights, the rights to manufacture and the rights to buy or sell or trade this particular machine at their will.

"Q. (By Mr. Groff): Now, to get directly to you, let's talk about the prototype itself, the physical [64] prototype. A. Yes.

"Q. Who owned that?

"A. The physical prototype, I would say, is the property of the Calnevar Company. It was built at their expense. They paid for the entire expense of the particular machine being fabricated.

"Q. And you had an arrangement with them to that effect, I suppose? A. Oh, yes.

"Q. I am interested in the detail on the reproduction, the repair of the damage.

"Gordon, I would like to have a copy of what apparently is with Calnevar. I see no reason to take Mr. Plotkin's deposition at this time if we could get a copy of that. I can't speak for Don here.

"Mr. Ruppe: That is satisfactory.

"Mr. Groff: Do you suppose we could have a copy of that?

(Deposition of Harold E. Sloier.)

"Mr. Wright: Sure, if they have it and we can get it.

"Mr. Groff: Can we get it while we are here?

"The Witness: I doubt it.

"Mr. Ruppe: Off the record.

"(A discussion was had off the record.) [65]

"Mr. Groff: No further questions at this time."

Mr. Ruppe then says, "I just have a couple of very short questions," and the examination of the witness continues by Mr. Ruppe:

"Q. You have given us certain dimensions as to the size of the crate.

"A. Those are approximate dimensions.

"Q. Could you give me the approximate size of the machine itself?

"A. Well, you see, now, to an engineer what I have to do is reverse it around. What I have to do is pick up the actual size of the particular machine itself and then add mentally the crate dimensions to it because the dimensions I gave you for the crate are approximate. That might change to a degree the size of the particular crate. If I recall, to the best of my knowledge, our machine was about 14 and one-half inches deep by about 20 inches wide, by approximately 62 inches high. That's about the size of the machine. Now, obviously that might conflict slightly with the size of the crate. There was about two inches of crating and padding material between the machine and the outside of the crate.

(Deposition of Harold E. Sloier.)

"Q. Approximately what did the machine itself weigh?

"A. Oh, I would say somewhere around 125 pounds. [66] This machine, I would say, was somewhere around in there.

"Q. Did you ever have a photograph of the machine, a picture of it?

"A. I imagine management has, you know, for advertising, and so forth. I do not have it here myself, no.

"Mr. Ruppe: That is all.

"Mr. Groff: I have a couple of more questions.

"Direct Examination

"(Continued)

"By Mr. Groff:

"Q. Did you eventually show the machine after it was repaired?

"A. Gee, that I couldn't say. I mean, after the particular machine was repaired and put together again, this company merged with the Shore-Calnevar Company and from then on the deals which they had I was out of touch with.

"Q. Do you know where the machine is now?

"A. Yes. I believe the machine now is, plus a lot of other parts, over at, I believe, Utility Appliance, or something like that, that we sold it to, I think.

"Mr. Wright: I don't know.

"The Witness: I don't know. I think it is Utility Appliance.

(Deposition of Harold E. Sloier.)

"Q. (By Mr. Groff): At this time is the prototype [67] machine that was damaged the only finished machine in existence——

"A. Well, I——

"Q. ——so far as you know?

"A. ——can't say. The machine now has been canibalized. What I mean by 'cannibalized,' is I think the machine has been entirely torn apart and rebuilt with some added features in it. I understand they might have put hot chocolate or something else in it, by the people who bought it.

"Q. So far as you know, the prototype, though, as it existed, is the only one of that type that is in existence now? A. Yes.

"Mr. Groff: I have no further questions.

"Mr. Ruppe: That is all.

"Mr. Groff: I will stipulate the deposition may be signed before any notary public.

"Mr. Ruppe: So stipulated.

"Mr. Wright: So stipulated."

The Court: All right.

Mr. Wright: Your Honor, reserving only leave to go ahead tomorrow morning on the question of damages, the plaintiff rests at this point.

The Court: All right. [68]

The Clerk: The deposition, Your Honor, that was marked as Plaintiff's Exhibit No. 5, may that now be admitted in evidence?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 5 admitted in evidence.

The Court: Now, gentlemen, we have only a few minutes left. These young men will probably begin strolling in, and we have made good progress, so I will not ask you to make your motion to dismiss now, but let him offer evidence in the morning, and then you can make your motion to dismiss, just like a motion for a non-suit. It is in the same field, that is, that the plaintiff has not proved a claim, and then I will tell you at the time whether I want any argument on the matter or not.

So we will recess at the present time. We could not achieve very much in fifteen minutes, and we will recess until tomorrow morning at 10:00 o'clock, and you gentlemen instruct your witnesses to return.

(Whereupon, at 11:45 o'clock a.m., Tuesday, January 10, 1956, an adjournment was taken until 10:00 o'clock a.m., Wednesday, January 11, 1956.) [69]

Wednesday, January 11, 1956—10:00 A.M.

The Court: Are there any ex parte matters?

(No response.)

The Clerk: Case No. 17927-Y, St. Paul Fire & Marine Insurance versus Trans World Airlines, et al., further trial. Mr. Gordon K. Wright for the plaintiff, Mr. Donald E. Ruppe and Mr. Robert D. Brill for the defendant Trans World Airlines, and Mr. Gene E. Groff for the defendant Twentieth Century Delivery Service.

The Court: All right, gentlemen, everything is out of the way, and we can continue the trial.

Mr. Wright: Thank you, sir. With the permission of the Court, then, I would like, on behalf of the plaintiff, to briefly go ahead with our damage proof.

The Court: Certainly. That is all right.

Mr. Wright: Mr. Clark, will you take the stand, please?

The Court: You said you wanted to rest, but I explained I would rather not let you rest, but complete your proof.

Mr. Wright: Yes, sir.

DONALD OWEN CLARK

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: What is your full name, sir? [71]

The Witness: Donald Owen Clark.

The Clerk: With an "e" on the end?

The Witness: No "e."

The Court: As a matter of fact, we already have in the deposition the fact of the handling, the dropping by the man who handled it, and then some testimony as to the nature of the damage. He described it.

Mr. Wright: Yes, sir.

The Court: Then a general appraisal of the need for the repairs, and the value, so we might as well complete it.

Mr. Wright: Yes, sir.

Direct Examination

By Mr. Wright:

Q. Mr. Clark, were you employed by the St. Paul Fire & Marine Insurance Company during the period from April of 1954, to January 1st of 1956?

A. Yes, I was.

Q. During that period did you have any occasion to deal with a loss involving the Calnevar Company, a corporation? A. I did.

Q. Did it come within the course of your duties to approve the payment of that loss?

A. Yes, it did.

Mr. Wright: Would you mind marking this? [72] I understand, Your Honor, there will be no objection to these documents.

The Court: All right.

The Clerk: A sworn statement in proof of loss is marked, for identification, as Plaintiff's Exhibit No. 8.

(The document referred to was marked Plaintiff's Exhibit 8, for identification.)

The Court: All right. Let's go on, gentlemen.

Mr. Wright: Thank you.

Q. This Plaintiff's Exhibit 8, which I show you, Mr. Clark, is that the sworn proof of loss which you took in connection with the Calnevar loss?

A. That is.

Q. I note that on the reverse of this Exhibit 8 there is a breakdown of items of expenditures. Was that attached to the proof of loss at the time that you received it? A. It was.

(Testimony of Donald Owen Clark.)

Q. And the item of $7,725, as shown on Exhibit 8, is for the physical damage, and the additional item of $1,931.25 is an additional 25 per cent of the original sum that I spoke about, which, added together, makes a total sum of $9,656.25; is that right?

A. That is right.

The Clerk: Do you offer this in evidence, Mr. Wright?

Mr. Wright: Yes, I offer that in evidence as Exhibit 8. [73]

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 8, heretofore identified, admitted in evidence.

(The document heretofore marked Plaintiff's Exhibit 8, was received in evidence.)

Q. (By Mr. Wright): Mr. Clark, prior to approving the payment of that loss to the Calnevar Company, did you satisfy yourself that, in your opinion, it was a reasonable and proper claim?

A. Yes, we did.

Q. Did you personally issue the draft in payment of the loss or sign the draft? A. Yes, I did.

Q. Did you thereafter receive from the Calnevar Company a subrogation receipt showing that payment? A. Yes, we did.

Mr. Wright: Would you mark that, please?

The Clerk: The subrogation receipt is marked as Plaintiff's Exhibit No. 9.

(The document referred to was marked Plaintiff's Exhibit 9, for identification.)

(Testimony of Donald Owen Clark.)

Q. (By Mr. Wright): Mr. Clark, I show you that subrogation receipt, and ask you if that is the receipt you received for the payment to Calnevar Company of the $9,625.25?

A. That is that subrogation receipt. [74]

Mr. Wright: We offer that in evidence, may it please the Court?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 9, heretofore identified, admitted in evidence.

(The document heretofore marked Plaintiff's Exhibit 9, was received in evidence.)

Mr. Wright: I have no further questions, Your Honor.

Cross-Examination

By Mr. Groff:

Q. Mr. Clark, did you ever see the machine itself? A. Yes, I did.

Q. Where did you see it?

A. At Calnevar's warehouse.

Q. And approximately when?

A. I would say approximately ten days to two weeks after the first notice that it was damaged was received by the company.

Q. Are you familiar with the type of repairs that were done in connection with this machine?

A. No, I am not.

Q. Do you have any knowledge as to—personally have any knowledge as to the reasonable cost of making such repairs? [75]

(Testimony of Donald Owen Clark.)

A. We relied on experts.

Q. And if I am correct, you relied on Mr. Graham, didn't you? A. Correct.

Q. The payment that was made and the proofs that were issued by the St. Paul were made and issued pursuant to Mr. Graham's report, weren't they? A. Correct; his recommendations.

Mr. Groff: Counsel, may we use the photostat, or do you have the original?

Mr. Wright: Yes. I have perhaps a better copy of Mr. Graham's report. Although it is not the original, it is signed.

Mr. Groff: May we have a stipulation, counsel, that this copy may be used in lieu of the original?

Mr. Wright: Yes, for all purposes. So stipulated.

Q. (My Mr. Groff): Mr. Clark, I show you a report of Mat Graham Co., dated August 13, 1954, and ask you if that is the report upon which the St. Paul based the adjustment of this loss?

A. That is the report.

Mr. Groff: I would like to offer that in evidence at this time.

The Clerk: Defendants' Exhibit A, a report of Mat Graham Co. is identified and has been offered in evidence, [76] Your Honor. May it be received?

The Court: It may be received.

The Clerk: Defendants' Exhibit A, identified and admitted in evidence.

(Testimony of Donald Owen Clark.)

(The document referred to was marked Defendants' Exhibit A, and received in evidence.)

Q. (By Mr. Groff): Mr. Clark, I notice from Mr. Graham's report that he says, "Based upon volume production the machine could be made for $600 to $700 each."

Other than that investigation, did the St. Paul make any other inquiry as to the value of the machine?

Mr. Wright: I will object to that as being incompetent and irrelevant, Your Honor.

The Court: Overruled. Go ahead.

The Witness: Repeat your question, please.

Mr. Groff: Would you read the question, please?

(The question was read.)

Mr. Wright: Your Honor, I must further object that the question is compound, vague, and indefinite.

The Court: Oh, no. Overruled. It is testing the circumstances around the approval of the claim, and the fixing of the damages in a certain amount.

The Witness: Mr. Graham was talking about, I believe, two separate machines, when he speaks of one on a mass production basis can be turned out for $600. This machine that [77] was damaged was a prototype machine.

Q. (By Mr. Groff): Let me ask it this way to you, Mr. Clark: Was the payment that was made

(Testimony of Donald Owen Clark.)

by the St. Paul based solely on Mr. Graham's report that is in evidence here?

A. We relied on him as an expert, yes.

Q. Now, what value did the St. Paul rely on as the total value of the prototype machine?

The Court: The statement gives the value at $75,000 on the face of it. The witness may not have seen that. He should be shown that.

Mr. Groff: In this? I am looking at Mr. Graham's report, Your Honor.

The Court: All right. You are looking at Exhibit A?

The Clerk: Yes, Defendants' A, Your Honor.

The Court: Go ahead. You may answer it.

The Witness: Are you making reference to their actual cost in developing the machine to the stage that it was at the point that it was damaged?

Mr. Groff: No, I am——

The Court: No, he is asking—read the question, please. The question is very plain. He is talking about valuation, what value did you rely on as the value of the machine as a whole.

The Witness: Because, by its nature, being prototype, there is nothing to compare this machine to, so it would [78] be——

The Court: Now, we know what the dictionary word "prototype" is. What does "prototype" mean in that particular situation?

The Witness: This machine was the only one of its kind, that our assureds had drafted, designed and constructed this particular machine, and I as-

(Testimony of Donald Owen Clark.)

sume that they would be searching for a patent on this.

The Court: It was a model?

The Witness: Correct.

The Court: Of a type which would have to be produced in quantity in a different manner?

The Witness: Correct.

The Court: I see.

The Witness: Assembly type production.

The Court: All right.

Q. (By Mr. Groff): Did you know at the time of this payment, Mr. Clark, that the machine in a finished form had been sent to St. Louis for showing? A. I did.

Q. Did you know that Calnevar at this time had drawings from which this machine could be produced on a production basis?

Mr. Wright: I will object to that as assuming a fact not in evidence. The testimony is all contrary to that, [79] that they could have made it in mass production from drawings.

The Court: That is all right. They don't have to accept the statement in the record. Overruled. In other words, they want to see if the insurance company was gullible. Overruled. Go ahead.

The Witness: Yes, I am thinking.

The Court: You are thinking. That is all right. I won't interrupt the process. So few people do that, and it is considered dangerous to think these days.

The Witness: Quite some time has passed since the loss was adjusted.

(Testimony of Donald Owen Clark.)

The Court: Go ahead.

The Witness: You had better reread the question, I think.

(The question was read.)

The Witness: No.

Q. (By Mr. Groff): The St. Paul, as far as you know, made no inquiry along that line?

A. Here, again, it went to the hands of the independent adjuster who was handling the loss in our behalf, and it was his duties to develop all aspects of it. And I can't positively state that he did or did not. I feel safe in saying I believe he did.

Q. Mr. Clark, it would be a true statement, a fair statement, wouldn't it, that the only value, total value of [80] the machine, that the St. Paul relied on was the cost of repair—was the cost of construction? A. Reconstruction.

Q. Now, construction originally?

A. That involves engineering time, and so forth, of which I understand there was quite an astronomical figure, nowheres in relationship to what was extended in this payment.

Q. Perhaps I have confused you with the question. Let me reask it. A. Yes.

The Court: Wait a minute. This payment was on a policy of insurance?

The Witness: Correct.

The Court: On damages, that you had written?

The Witness: Correct.

(Testimony of Donald Owen Clark.)

The Court: And what was the maximum allowed?

The Witness: Could I see the policy?

Mr. Wright: Yes, Your Honor, that statement is on the proof of loss.

The Court: What?

Mr. Wright: That is right before us here on the proof of loss.

The Court: Is that where the $75,000 appears?

Mr. Wright: The $75,000 is the amount of——

The Witness: The limit of liability. [81]

The Court: The limit of liability. In other words, let me ask you this question: Isn't it a fact that insurance companies try to approximate the value of a thing they insure——

The Witness: That is correct.

The Court: ——before they write a policy?

The Witness: Correct.

The Court: Isn't that true?

The Witness: That is the underwriter's duties.

The Court: What?

The Witness: That is the underwriter's duties of the company.

The Court: That is right. In fact, sometimes you will ask for a survey of a home——

The Witness: Of appraisal, correct.

The Court: ——before you renew a policy, to see if the property has deteriorated. You don't just take a man's word for it. When he says, "Look, I have got a piece of machinery which is worth $75,000, and I want it insured against loss in that

(Testimony of Donald Owen Clark.)

amount"? You would be broke before long if you did that, wouldn't you?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Groff): Mr. Clark, in this case did the St. Paul make an appraisal of this machine before they wrote [82] the policy?

A. I can't answer that question. That was the underwriting department's activities.

Q. Mr. Clark, does the St. Paul make appraisals of complicated machines like this before they write a policy?

A. I am a loss adjuster, and that, again, is an underwriting matter.

Q. Who is your underwriter?

A. Gordon Rennie.

Q. Mr. Clark, I notice on Mr. Graham's report that he has set out several alternatives in the payment of this claim. Apparently, one of the alternatives that was selected was not necessarily the lowest amount. Can you explain that to us?

A. I believe that reason was because the policy had an expediting clause in it, whereby 25 per cent, in addition to the amount of loss, would be paid. So, therefore, they took the category that would involve the least time, so that the expediting condition or 25 per cent would not be any greater.

Q. Let me look at that with you. I believe the expediting is handled separately. I refer you to page 3 of Mr. Graham's report, where he comes out at $6,865. I refer you to No. 3, in which he comes out

(Testimony of Donald Owen Clark.)

at $7,725 on page 4. From the schedule of loss I have I note that you [83] appear to have used the $7,725, in lieu of the figure set forth under 4, on page 3, which is lower. What is the explanation for that?

A. I think Mr. Mat Graham can, and would be able to re-explain that for us. It was explained by that adjuster, who handled that particular adjustment, and I can't specifically recall the reason, but a reason was given, and it was agreed that that was the best procedure to follow.

Q. You elected to pay the $7,725, as set forth in Graham's report; that is correct?

A. That is correct.

Q. And the expediting you speak of, that is in addition to the amount that was ascertained by Graham's report for repairs; isn't it?

A. That is correct, and I——

Q. And that is an arbitrary figure that is based on an equation set up in your insurance contract, isn't it? A. That is correct.

Q. And there was no investigation made by you whatsoever as to what the value of the loss of use of the machine was, was there?

A. It was predetermined by the policy contract.

Q. You paid off on the basis of the contract alone, without any basis in fact, as developed from the loss itself; that is a correct statement, isn't it? [84] A. You mean insofar as the loss——

Mr. Wright: I will object to that, unless you are referring to——

The Court: No, that is not a correct statement,

(Testimony of Donald Owen Clark.)

because the Graham report shows that these men are civil engineers, and mechanical engineers, and they made a very minute and detailed report showing the $7,725 to be the actual physical damage. So it isn't a fair question. * * *

Mr. Groff: I am awfully sorry, Your Honor. I think you might have misunderstood me. I was talking about the nineteen hundred odd-dollar item down there.

The Court: I am not talking about that. You ask him about the entire amount that they paid, and you didn't segregate that, the $9600. If you want to ask a question as to the $1900 being a formula, yes. But the way you asked it, it intimated there was no investigation of any part of it.

Mr. Groff: I am awfully sorry, Your Honor.

The Court: When you have a report of men registered—it is very remarkable. Look at it. They are registered in all three professions, civil engineer, electrical enginer, and mchanical engineer. [85]

Mr. Groff: I know them, Your Honor, and they are very good.

The Court: Even if they are not here, I respect men of that type, and this isn't some appraiser who goes around and tries to look over a piece of property that has been burned, and make an appraisal. These are technical men who are licensed by the State of California, who make a report.

* * *

Mr. Groff: Let me reask the question:

Q. Referring to the $1931.25 item, Mr. Clark, is

(Testimony of Donald Owen Clark.)

it true that that item was paid purely on the basis of a formula set up in the policy?

A. It was paid in accordance with the agreed conditions of that policy, that the company would do that; that in the event that the loss was X-dollars, it would pay 25 per cent above that X-dollars.

Q. And concerning the $1931.25 item, so far as you know, no further investigation was made as to the factual basis for the loss of use applying to that item?

A. It was contractual in the policy.

Q. Contractual only? [86] A. Correct.

Mr. Groff: I have no further questions.

The Court: All right.

Mr. Wright: Thank you, Mr. Clark.

The Court: Read the last question and answer. You know, gentlemen, I am also chief judge, and in order to carry on trials, nevertheless I have to pay attention to other things. The bailiff brought me a note, and I had to look at it, so I want to be sure I caught the implication of the last question. I caught the first one, that he based it on the basis of the formula which called for 25 per cent over and above the actual cost. But read the last one to me, please.

(The record was read.)

The Court: I missed that last one, which was a repetition of the same thing.

(Witness excused.)

Mr. Wright: The plaintiff rests, your Honor.

The Court: All right. Proceed, gentlemen.

Mr. Groff: If it please your Honor, at this time, on behalf of the defendant Twentieth Century, the defendant Twentieth Century moves for a dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief in this action.

By the evidence, and by counsel's statement, the crux of this problem, your Honor, is whether the limitation under [87] the Air Freight Rules Tariff, it applies to damage if damage is occasioned while in the hands of Twentieth Century in this instance.

The problem is whether by the Air Freight Rules Tariff, and by these facts the limitation as filed is applicable.

In evidence is the contract between Air Cargo and Twentieth Century. By stipulation, this contract was made pursuant to an arrangement between TWA and Air Cargo.

This contract provides that Air Cargo was acting as agent for certain airplane companies, air carriers, among them TWA, and the contract provides that Twentieth Century is to be a ground carrier, performing a pickup and delivery service for and on behalf of TWA.

Going to the Air Freight Rules Tariff, Section No. 3.1(c) of the Air Freight Rules Tariff No. 1-A, in evidence, provides in part as follows——

The Court: Just a moment. Let me interrupt you. I merely wanted you to state the grounds. I am not going to decide it upon the motion to dismiss. I want all the evidence in. [88]

* * *

Mr. Groff: Let me just amplify the grounds a little, then, your Honor.

The Court: All right.

Mr. Groff: On the grounds that the facts and the law establish that Twentieth Century was rendering delivery service for a carrier at the time the damage occurred, if any damage occurred, and are entitled to the benefit of the limitation by Air Freight Rules Tariff.

The Court: I don't want to argue this. As I told you, I don't want argument, but I am not very much impressed by your argument, because that is made for the benefit of the shipper, not for somebody whom they use as their agent. The limitations are not made for the benefit of those whom they use. [92]

* * *

I am giving you now merely an illustration. I will let you argue it, but it is my custom always to give my first impression. I got the drift of it from what was said here yesterday, what the discussion would be, and from the pretrial memorandum, and it is my view that that limitation was for the mutual benefit of the shipper and TWA, that that did not blanket the people they may employ for transporting on land the freight after they had landed it, because in the law of insurance transportation by air freight is a high risk. It is a very expensive process. I know, because we paid $40 to transport a dog from here to my little granddaughter, whose father is a professor at the University of Illinois, to Urbana, Illinois. When those are the rates that you

charge, then you can't extend the benefit of a contract like that to persons who act on land, unless the language is very clear and specific.

Mr. Groff: I believe the language of the Air Freight Rules Tariff is specific, your Honor, right to the point.

The Court: All right, read it now. So long as I told you what my reaction was, read the portion you have in mind.

Mr. Groff (Reading):

"The airbill, and the tariffs applicable to the shipment shall apply at all times when the shipment is [93] being handled by or for the carrier, including air transportation by the carrier and pick-up, delivery and other ground services rendered by the carrier or any other person performing for the carrier, such pick-up, delivery or ground services in connection with the shipment."

The Court: All right. The question then arises on what basis it is. We are back to the question that I handled in the State of Oregon, whether they were independent contractors, doing that upon that basis, or whether they were agents of the company. We will argue that. It is an arguable point.

So the motion will be denied. [94]

* * *

WALTON ROLLAND MANUEL

called as a witness on behalf of the defendant Twentieth Century Delivery Service, Inc., having been first duly sworn, testified as follows:

The Clerk: What is your full name, sir?
The Witness: Walton Rolland Manuel.
The Clerk: W-a-l-t-o-n? [95]
The Witness: Yes.
The Clerk: R-o-l-a-n-d?
The Witness: Two "l's."
The Clerk: And the last name is?
The Witness: M-a-n-u-e-l.

Direct Examination

By Mr. Groff:

Q. Mr. Manuel, what is your present occupation?

A. I drive a truck for Twentieth Century Delivery.

Q. And you were so employed in July of 1954?

A. Yes, sir.

Q. You had occasion in the course of your employment to make delivery of a certain object to Calnevar on Washington Boulevard?

A. Yes, sir.

Q. That was about July 12th, was it?

A. Yes, sir.

Q. Would you state to us what happened, as you drove up and made—from the time that you drove up in front of the Calnevar plant on Washington on that day, and made delivery?

A. Well, first, there was no place to park next to

(Testimony of Walton Rolland Manuel.)

the curb, so I double parked, as near to what I thought would be the receiving door of Calnevar, in that they had several different places where they did receive. [96]

After parking, I went in the office to find out if this was the particular place where the merchandise would be unloaded.

I talked to the girl at the switchboard. She called some man, or the man came by. It seemed to be in his category—what I had to deliver was along his line, so he took the airbill, and said, "This is where it would be delivered."

So he asked me what kind of a—what I had to bring it in with.

I told him I had a two-wheel hand truck.

Well, he said, "I will get somebody to get a four-wheel dolly, and help you bring it in."

So I went back out to my truck, slid the case over more or less to the middle of the truck. Being a long case, I eased it out to the back of the truck, set it up, set it up straight, straight up and down, the long way up, and while I was still standing there, waiting for this man and the dolly to come out, I noticed that I had unloaded it upside down, the arrows were pointing down.

So while I was still waiting for them to come out with the dolly, I laid the crate down, and set it back up. And when I had done all this, these two men were coming out, then. They were approximately on the sidewalk, or coming down the ramp, sort of the driveway approach at the time.

So there was nothing more said, but the man

(Testimony of Walton Rolland Manuel.)

asked me [97] if we would help—if we would put this on the four-wheel dolly, and asked if I would help take it inside. So we just put in on the dolly, and took it inside. I had a sig—a man to sign it, no complaints, and nothing was said about unloading, or damages at the time.

Q. Did you leave the premises, then?

A. Yes, sir.

Q. Where was the crate at the time you last saw it on the premises?

A. Well, it was sitting inside of the Calnevar plant, somewhere down this driveway. I would say, approximately, probably fifteen or twenty feet inside the building.

Q. Was it on or off the dolly?

A. It was still on the dolly.

Q. Where had you picked the crate up?

A. At the Twentieth Century dock.

Q. Did you have other deliveries to make before you made the delivery to Calnevar?

A. Yes, sir.

Q. During the time that you left the Twentieth Century dock to the time that you reached the Calnevar plant, did you or did you not have any unusual incidents in connection with the driving of your car? A. No, sir.

Q. Do you recall having any rough roads, or hitting [98] anything? A. No, sir.

Mr. Groff: Your Honor, might I have the airbill exhibit, please?

The Clerk: The airbill is Plaintiff's Exhibit No. 2 (handing document to counsel).

Q. (By Mr. Groff): Mr. Manuel, you mentioned about an airbill, and I show you Plaintiff's Exhibit No. 2, and ask you if that appears to be a copy of the airbill that you presented for signature at Calnevar? A. Yes, sir.

Q. And you took one of those. What did you do with your copy?

A. The original copy I returned with the signature back to—which this looks like—back to Twentieth Century, which in turn is returned to TWA.

Q. And I note it is stated, "Received in Good Order and Condition, Except as Noted on Reverse Side, consignee Calnevar Co.," and there is a signature there. Can you identify the signature for us?

A. That is the gentleman that assisted in taking the crate inside.

Q. I show you Plaintiff's Exhibit 7, which is a picture, and ask you if you can identify that for us?

A. Yes; that is the drive which we pushed the dolly in. [99]

Q. And where was your truck parked in relation to the only black car that shows in the left-hand corner of that picture?

A. Well, my—the back of my truck was approximately even with the driveway; just enough to clear the drive.

Q. On the truck that you were driving that day, did you have any names or signs painted on it? Did you?

A. It said, "Twentieth Century Delivery."

Q. Anything else on it?

A. It has, I imagine, an I.C.C. number. I think so.

Mr. Groff: I have no further questions.

Mr. Wright: I have no questions of the witness, your Honor.

Mr. Brill: I have no questions, your Honor.

The Court: All right.

(Witness excused.)

Mr. Groff: I will call Mr. Miller.

JEROME M. MILLER

called as a witness on behalf of the defendant Twentieth Century Delivery Service, Inc., having been first duly sworn, testified as follows:

The Clerk: What is your full name, sir?

The Witness: Jerome M. Miller.

The Clerk: J-e-r-o-m-e M. M-i-l-l-e-r? [100]

The Witness: Right.

The Clerk: Thank you.

Direct Examination

By Mr. Groff:

Q. Mr. Miller, what is your present occupation?

A. Superintendent of Twentieth Century Delivery Service.

Q. Was that your occupation in July of 1954?

A. It was.

Q. And Twentieth Century is a delivery service, isn't it? That is your business?

A. Yes, sir, pickup and delivery.

Q. Now, in connection with your business, do you make deliveries for certain airlines?

A. Yes, sir, we make deliveries for all of the major scheduled airlines in Los Angeles.

(Testimony of Jerome M. Miller.)

Q. And do you make deliveries for TWA?

A. Yes, sir.

Q. Would you explain to the court your procedure in receiving your orders and making your pickups and your deliveries in connection with TWA?

The Court: Let's find out, first, how the relationship is established. Do they contract, or do they work by the piece, or what do they do? That will become very important. [101]

Mr. Wright: Your Honor, may I invite the court's attention to the contract, which is in evidence, governing the relationship of this party. That is Plaintiff's Exhibit 4 in evidence, by stipulation.

The Court: Let me see that. I had overlooked that.

(The document was handed to the court.)

The Court: Go ahead.

The Witness: We are the sole pickup and delivery agent for these major airlines in Los Angeles, and we perform regular pickup and delivery service for all of the airlines. Anyone that wishes anything picked up, or anything picked up by the airlines, it is handled through our service. We get our orders from the airlines.

Now, on deliveries, we report—we have offices at the airport, and we report at midnight, and start checking the loads from the various airlines on

(Testimony of Jerome M. Miller.)

the deliveries, and we have responsible men at the airport for checking these deliveries.

They are taken from the airplanes, loaded into the various airlines receiving dock. Then our superintendent, or our foreman out there, will check the merchandise from the airbill to the consist. The consist is what the airlines prepare for us, so that we may in turn rebill them.

Then it is loaded into one of our pieces of equipment. Mainly on the smaller merchandise, it is shuttled down to [102] our downtown terminal. On large loads, why, if it is more economical to handle them direct, we will handle them direct from the airport to the consignee.

But we will have anywhere from, oh, five to six trucks delivering on a morning trip like that from the airport into our terminal, and then it is redistributed among approximately a hundred trucks for delivery that morning.

Q. (By Mr. Groff): I show you Plaintiff's Exhibit 2, which is an airbill in connection with the Calnevar shipment. How did that get into your hands—into the hands of Twentieth Century?

A. This airbill is given to us, along with all of the airbills which come into TWA, or Trans World Airlines for delivery.

They are given to our foreman at the airport, along with the consist. There may be anywhere from ten to 100 or 200 deliveries every morning, and they will give us that many airbills for their deliveries.

(Testimony of Jerome M. Miller.)

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Q. In addition to the airbill, are there any other documents that give you directions as to where to deliver the goods?

A. They prepare a consist, which also shows the airbill, and the shipper and the consignee, and the number of pieces, and the weight, which we use for billing, also. But we have that. We have a copy for our own files, and then [103] after we bill it, we send a copy back to them.

Q. And concerning the consist, does the driver take the consist?

A. Our foreman takes the consist, after he checks the freight and makes sure that we have the freight from the airlines.

Q. Is the airbill the only thing that the driver gets?

A. The airbill is the only thing that the driver gets.

Mr. Groff: I have no further questions.

Cross-Examination

By Mr. Wright:

Q. Mr. Miller, is there some system whereby your supervisor or foreman out at the airport makes a notation if he discovers that a particular item of air cargo is damaged at the time it is tendered to him?

A. Yes, sir. Our foreman, and all of our drivers and employees are instructed to be very careful on freight that they receive. If there are any gouges, or if any merchandise is opened, looks like it has been opened and recoopered, they are instructed to

(Testimony of Jerome M. Miller.)

make a notation on this consist, and which they have been following fairly religiously.

Q. I see. In other words, the practice is that at the time American Airlines, or TWA, or someone gives them [104] the airbill and the consist, and the supervisor out there at the airport sees the package has been damaged, or re-coopered, he then makes a notation on the consist? A. Yes, sir.

Mr. Wright: Thank you very much. I have no further questions.

Mr. Brill: I have no questions.

The Court: Al right. Step down.

(Witness excused.)

Mr. Groff: The defendant Twentieth Century Delivery Service rests.

The Court: All right.

Mr. Brill: The defendant Trans World Airlines, Inc., rests, your Honor.

The Court: All right. Any rebuttal?

Mr. Wright: No, your Honor.

The Court: Then I will hear any argument you want to present. [105]

* * *

Mr. Wright: Your Honor, I don't think we have established a case against Trans World Airlines. My reason for bringing the Trans World Airlines in is simply this, as I have told counsel: Without Trans World Airlines in the picture, there is no connection. We have no way of knowing what this

relation is between the parties until the proofs are in, you see. In other words, we only contract——

The Court: Do you want to dismiss now as to Trans World Airlines?

Mr. Wright: We will dismiss as to Trans World Airlines.

The Court: All right. Voluntary dismissal will be entered under Section 41(a) as to Trans World Airlines. [117]

* * *

The Court: All right. The matter will stand submitted, gentlemen. I want to take a little time to clarify my thoughts on the matter, and you will be notified in due time.

I think the question of liability is comparatively easy. It presents a question of fact. The other one presents a little different question, and I will work it out, and let you know.

[Endorsed]: Filed April 5, 1956. [143]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 42, inclusive, contain the original

First Amended complaint;

Answer of Defendant Trans World Airlines, Inc.;

Answer of defendant Twentieth Century Delivery Service;

Stipulation re Dismissal;

Findings of Fact & Conclusions of Law & Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court had on: January 10, 1956; January 11, 1956; January 18, 1956; and plaintiff's exhibits 1 through 9, inclusive, and defendant's exhibit A, all in the above-entitled cause; constitute the transcript of record to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the foregoing transcript amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 2nd day of April, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15085. United States Court of Appeals for the Ninth Circuit. Twentieth Century Delivery Service, Inc., a Corporation, Appellant, vs. St. Paul Fire and Marine Insurance Company, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed: April 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 15085

TWENTIETH CENTURY DELIVERY SERVICE, INC.,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes Now the Appellant and submits herewith its Statement of Points:

I.

That the following Findings of Fact are not supported by the evidence:

Finding No. IX. "**On or about July 12, 1954,** Trans World Airlines, Inc., did hand said coffee vending machine in good order and condition to defendant Twentieth Century Delivery Service, Inc., for delivery to Calnevar at Los Angeles International Airport."

Finding No. XI. "That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged."

Indicated portion of Finding No. XIII. "That the sum of $1,931.25 was the reasonable value of the loss of use of said coffee maker."

The indicated portion of Finding No. XVIII. "That defendant Twentieth Century Delivery Service, Inc., * * * and was not covered or encompassed within or by the said air freight tariff of Trans World Airlines, Inc."

Finding No. XIX. "That there is no evidence that the Calnevar Company entered into any agreement with defendant Twentieth Century Delivery Service, Inc., respecting the value of said automatic coffee maker."

II.

The following Conclusions of Law are not supported by the evidence and are contrary to law:

Conclusion No. I. "That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc."

Conclusion No. II. "That defendant Twentieth Century Delivery Service, Inc., cannot limit its liability for said damage by any provision contained in air freight tariff of Trans World Airlines, Inc."

Conclusion No. III. "That the damage reasonably sustained by Calnevar Company was in the sum of $9,656.25."

Conclusion No. V. "That plaintiff is entitled to judgment against Twentieth Century Delivery Service, Inc., in the sum of $9,656.25."

Respectfully submitted,

/s/ GENE E. GROFF,

Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 11, 1956.